[redacted] District of Texas.

IN CHANCERY.

W. K. STEPHENSON AND OTHERS

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY.

[redacted] Order and Final Order.

MONDAY, JUNE 17, 1878.

Nos. 68 and 69.—In Equity.

V. K. STEPHENSON AND OTHERS

vs.

THE TEXAS & PACIFIC RAILWAY COMPANY.

PENDING IN U. S. CIRCUIT COURT OF TYLER, TEXAS.

This suit was commenced on the 16th day of April, 1873. It is alleged by the complainant, Stephenson, in his bill and amended bills, that on the 25th day of August, 1860, a company then known as the Southern Pacific Railroad Company executed two mortgages, or trust deeds, to secure the payment of construction bonds with coupons attached, thereafter to be issued by said company for raising money to build its road, and for other purposes. That, on the 1st of September, 1860, the company did issue 350 construction bonds of $1,000 each, payable on the 1st day of January, 1883, with coupons attached, payable semi-annually, beginning with January 1st, 1861, and did sell, pass, and put into circulation about 200 of the said bonds, of 148 of which he claims to be the owner and holder, for a valuable consideration. The defendants, in sworn answers, deny these averments, and say that if such mortgages and bonds were ever executed or issued, it was done without the authority of the said Southern Pacific Railroad Company, was in violation of law, and null and void. In support of these averments they say, among other things, that the by-law

and resolution purporting to have been made, one by the directors and the other by the stockholders of said company, on the 5th day of October, 1859, and under and by virtue of which it is claimed that the mortgages and bonds were executed, are a fraud and forgery; that no such by-law was ever adopted by the stockholders, and that no such resolution was ever passed by the directors, and that they were falsely and fraudulently interpolated and inserted in the record book of said company, known as Book No. 2, as found on pages 63 and 64 of the same.

The case has been heard and considered upon the bills and amended bills, the answer and amended answers, and the exhibits and proofs.

From a careful examination and consideration of them all, it is my opinion that no authority existed for the execution of the bonds and mortgages; that the by-law claimed to have been passed by the stockholders on the 5th of October, 1859, was not made at any meeting of the same, and that the resolution claimed to have been passed, at the same date, by the directors, was never in fact passed by them; that, therefore, there was a want of power and authority for executing the mortgages and bonds in question, and on this account they are null and void, as not being the act and deed of the company.

It is further my opinion that what purports to be a resolution of the company indorsed upon the bonds was never passed at any meeting of the stockholders or directors thereof, and is void as not being the act of the company.

If I should be mistaken in my conclusions upon this subject as respects the mortgages, I do not think I can be as respects the bonds, admitting that the mortgages were binding upon the company. I have looked in vain for any evidence showing that the company authorized the issuance of bonds, excepting that which is contained in the resolution of the meeting of directors, purporting to have been passed on the 5th of October, 1859, and which is alleged

by the defendants to have been a fraudulent entry on the books. Supposing it to have been genuine, however, this resolution authorized the execution of a mortgage upon six millions of acres of the land donated by the State of Texas to the company, to secure, among other things, the payment of twenty-five millions of construction bonds, issued from time to time "as ordered by the board of directors," &c. So far as I have been able to discover from the evidence before me, no such resolution was ever passed by the board of directors as that authorizing the issue of the 350 construction bonds, as alleged in complainant's bill, or of any construction bonds whatever. It seems to me, therefore, that there must have been an utter want of power on the part of those who issued the bonds herein sued on. But, apart from the want of power and authority on the part of those who issued the mortgages and bonds in question, the matter is to be viewed in reference to the charge of fraud as made by the defendants.

In the case of Smith *v.* Sac County, reported in 11th Wall., 139, it was held that fraud in the origin or inception of negotiable bonds and coupons issued by a public corporation, will throw upon the holder the burden of showing that he gave a valuable consideration for them before maturity. Here is a case in which an inspection of Book No. 2 will satisfy any one, as it seems to me, that the entries made on pages 63 and 64 were made by some one falsely and fraudulently. No matter by whom it was done, I think that an inspection of the book itself, in connection with all the evidence in regard to the execution and issuance of the bonds, will throw such a cloud of suspicion around them as to require of all the parties suing in this case to show that they paid a valuable consideration for the bonds and coupons sued on, and that they had no knowledge of any illegality attending their issue. This, in my judgment, has not been done by any of the complainants.

I deem it unnecessary to say anything as to the judicial sales made of the road, at different times, or of their legal effect upon the complainant's case. Nor do I think it necessary for me to notice the many objections taken, *pro* and *con*, to interrogatories propounded to witnesses, and their answers thereto. All the testimony which bears upon the question of power or authority in executing the mortgages and issuing the bonds has been considered by me, as also that which goes to sustain or discredit the charge of fraud.

I may say, however, that so far as the defendant's objections to the testimony of Martin Tally, J. W. Howard, and J. N. Coleman are concerned, and the motion to suppress the depositions of H. McKay and William Bradfield, they may be regarded as overruled, the same having been considered by me for what it was worth upon the whole case as made by the record before me. I think there is no equity in the bills of the complainants, and that they ought to be dismissed at their costs. It is so ordered and adjudged. The clerk of this court will enter the decree of dismissal here, and send a certified copy thereof to the clerk of the United States Circuit Court at Tyler, with directions to enter the same upon the minutes there on the 1st day of the next November term, *nunc pro tunc*, as if the said decree had been rendered at Tyler on the last day of the last April term thereof.

T. H. Du Val.

The clerk here will also send to the clerk at Tyler a certified copy of the written stipulation entered into by counsel in this case on Saturday last, with instructions to him to file the same among the papers of the cause.

T. H. D.

V. K. STEPHENSON and W. H. SMITH, Complainants, consolidated, and GEORGE FLOURNOY, J. D. ARUNDEL, R. W. HEYMAN, *et als.*, Intervenors, *vs.* THE TEXAS PACIFIC RAILWAY COMPANY, R. W. LOUGHERY, and A. T. SMITH, *et als.*, Defendants.	In Chancery. Nos. 68 and 69.

In the Circuit Court of the United States for the Western District of Texas, at Austin, having been transferred from Tyler, by consent of the parties in writing and on file, for the purpose of having a final decree entered therein.

This cause came on to be heard upon the bills and amended bills, answer and amended answers, exhibits and proofs, and the same was argued by counsel and submitted to the court, at the November term thereof, A. D. 1876, at Tyler; and thereupon, on consideration thereof, on this the 17th day of June, 1878, it was ordered, adjudged, and decreed by the court that the complainants' bills be dismissed, and that the complainants pay all costs in this behalf incurred.

And then come the complainants in open court, and pray an appeal to the Supreme Court of the United States, which appeal by this court is allowed.

It is further ordered by the court, upon application of both parties, that the original Record Books, numbered 1, 2, 3, and 4, of the Southern Pacific Railroad Company, which are referred to and used by both parties to this cause as exhibits, shall be sent by express by the clerk of this court at Tyler to the clerk of the Supreme Court at Washington city; or, if the defendants to whom said books belong, should prefer that they be taken and delivered as aforesaid, by the clerk at Tyler, or by one of his sworn deputies, then it is ordered that they be transmitted in that

way, provided said defendants pay the expense attending such transmission.

T. H. Du Val,
U. S. Judge.

I, Matthew Hopkins, clerk of the Circuit Court of the United States for the Western District of Texas, do hereby certify that the foregoing pages contain a full and true copy of the opinion and final order of the court, in the case of V. K. Stephenson and others *v.* The Texas and Pacific Railway Company, Nos. 68 and 69, chancery.

In testimony whereof I hereto set my hand and the seal of said court, at the city of Austin, this the 26th day of June, A. D. 1878.

[SEAL.] M. Hopkins, *Clerk.*

In the Circuit Court of the United States

For the Western District of Texas, at Tyler.

COMPLAINANTS' BRIEF

IN CHANCERY.

VERNON K. STEVENSON ET AL., COMPLAINANTS,

No. 68. ——VS.——

THE TEXAS & PACIFIC RAILROAD COMPANY

ET AL., DEFENDANTS.

W. S.

[redacted] HERNDON,

SOLICITORS FOR DEFENDANTS.

MARSHALL:
JENNINGS BROS., PRINTERS, BINDERS AND BLANK BOOK MAKERS.
1877.

COMPLAINANT'S BRIEF.

Complainant filed his bill against the Defendants in this Court on the sixteenth of April, 1873, and framed it as a creditors' bill to the extent of all holders of construction bonds like those described in this bill. He alleges, among other things, that he is owner, holder and bearer of one hundred construction bonds of one thousand dollars each, executed by the Southern Pacific Railroad Company, September 1st, 1860—with forty-five coupons attached—the bonds becoming due January 1st, 1883, and the first coupon falling due January 1st, 1861, and every six months thereafter, each coupon for $35, the said bonds and coupons payable to bearer in New York city; that he holds, and is the bearer of, forty-eight of said construction bonds for one thousand dollars each, with forty-five coupons attached to each, like the first hundred bonds described, except the numbers thereof. These forty-eight bonds he holds as collateral security for thirty thousand dollars, and interest, paid as endorser for said Southern Pacific Railroad Company, in the manner described; that he became the endorser for said Southern Pacific Railroad Company, October 15, 1860, on three ten thousand dollar notes, to procure a loan for said Company, said notes falling due six months thereafter; that the same were protested for non-payment eighteenth April, 1861, and afterwards paid by him in full on twenty-fourth day of January, 1866, by which Complainant became entitled to the possession of and the right to foreclose his lien on said forty-eight bonds, which were delivered by the said Southern Pacific Railroad Company as collateral security at the date of the execution and delivery of the notes.

That the said Defendant is indebted to Complainant on account of salary, advances, loans and moneys laid out and expended for the Southern Pacific Railroad Company, as agent and President of the same, with interest to March 1st, 1873, in the sum of $54,257.88.

That the said bonds, and the interest coupons thereon, the said thirty thousand dollars procured as a loan for said Company, and the account rendered, are all secured by a general and interest mortgage, executed by the Southern Pacific Railroad Company, under its corporate seal, on the twenty-fifth day of August, 1860, with trustees named therein, upon the entire property of said Company, the franchise and corporate privileges, road-bed, chartered rights, lands and grants, either owned or hereafter to be acquired, which said mortgages were duly recorded in the proper office of Harrison county, Texas, where the principal office of the Company was then, and now, located, March 1, 1861.

That inasmuch as this is a creditor's bill, so far as the bonds are concerned, all of the same series and issue, holding the like security under the same mortgages, that J. D. Arundal, owner and bearer of two of said bonds; James Gillum, owner and bearer of one of said bonds; George F. Flournoy, owner and bearer of twelve of said bonds, and R. W. Hymen, owner and bearer of ten of said bonds, have all made themselves parties to this bill, and adopted the pleadings and evidence of Complainant, and otherwise submitted themselves to the jurisdiction of the Court, and ask for relief.

That W. H. Smith, the owner and bearer of thirty (30) of said bonds, who has filed his bill in this Court, No. 69, against the said Defendants, and in which case the evidence taken in this cause by agreements filed, is to be used so far as applicable, is entitled to the same remedy and relief as the other creditors mentioned, and whose bill ought to be consolidated with Complainants, and the said Smith be considered as one of the creditors of Defendants. And, under this view, W. H. Smith will be treated as one of the creditors of Defendants, as though his bill was consolidated with that of Complainant.*

*By order of the Court the case of W. H. Smith was consolidated with that of V. K. Stevenson *et al.*

The relief asked for by Complainant and other creditors holding bonds is:

1st. That they have a decree for the past due coupons, with interest on each at seven per centum per annum from the maturity of each.

2nd. That the bonds and their securities, the deeds of mortgage be held to be of full force and validity, and a lien upon the entire road, road-bed, chartered rights, franchise, property, lands and grants of the Defendants, acquired or constructed under, or on the chartered route of the Southern Pacific Railroad Company.

3rd. That the several sales of the Southern Pacific Railroad Company, to-wit: that of third September, 1861, fourth of April, 1868, of the lease of the Vicksburg, Shreveport & Texas Railroad; fifth of May, 1868, sixth of October, 1868, and twenty-first of March, 1872, be each held as subordinate to the deeds of mortgage aforesaid; that the lien created by said mortgage in favor of the holders of said construction bonds, and the *bona fide* creditors and stockholders under the same, be considered superior to every sale made subsequent to the execution of said deeds of mortgages, of full force and validity, and, if need be, that said sales be held null and void, for fraud and for want of legal authority to make such sales.

4th. That Complainant have a decree for the full amount of the three ten thousand dollar notes, with interest on the same, paid by him on twenty-fourth day of January, 1866, the interest at seven per cent. per annum on the whole sum, so paid since January 24, 1866; and that his lien on the forty-eight construction bonds, and the interest thereon, be foreclosed, and the same sold and proceeds applied as prayed for in his bill.

5th. That he have a decree for the full amount of his account as rendered, with interest; and that the said amount of the account, and the balance unpaid, if any, of the three ten thousand dollar notes by the sale of the forty-eight bonds, be decreed to be secured by virtue of the said mortgage, and that the lien created thereby be foreclosed and enforced against the property of Defendants covered by said mortgage.

The defences set up and relied on by Defendants, as presented by their pleadings, are as follows:

1st. That Complainant, V. K. Stevenson, was never legally and in fact the President of the Soutnern Pacific Railroad Company, and, consequently, all acts of his concerning the said Company, such as executing said mortgages, borrowing money for the construction of the road, signing bonds and obligations, presiding at meetings, etc., were utterly void.

2nd. That said mortgages, although executed and recorded as alleged, created no lien in favor of holders of bonds issued thereunder, constituted no notice to subsequent purchasers of the road-bed, franchise and chartered rights, were of no binding force against the Company, because they were not authorized by the stockholders and directors as prescribed and directed by the by-laws of said Company, and were and are void.

3rd. That the Company never issued any construction bonds as described in Complainant's bill; never authorized their issue; never sold, delivered or received value therefor; that if issued at all, it was through the fraud of Complainant and his confederates, and the Company is not liable for the bonds, coupons, nor the interest on the coupons.

4th. That Complainant, V. K. Stevenson, is not the owner and bearer of the one hundred, and of the forty-eight of said bonds described, for value or otherwise; that the forty-eight bonds are not held as collateral security for the three ten thousand dollar notes described; that no part of said sum was ever received by the Company; that Complainant was not the endorser, and did not pay off the same, and that the Defendant is not liable therefor.

5th. That the Southern Pacific Railroad Company never engaged Complainant as President; never agreed to pay for his services, nor authorized him to make advances for it, and that such sums are not owing by the Company, nor secured by said mortgages; but if they were, the same is barred by limitations of two years.

6th. That by virtue of the judicial sale of said Southern Pacific Railroad and its property third of September, 1861, of

fifth May, 1868, of sixth October, 1868, the sale of the lease of the Vicksburg, Shreveport and Texas Railroad in Louisiana fourth of April, 1868, and the sale of said Company to the Defendant; the Texas Pacific Railway Company twenty-first of March, 1872, the Complainant and all other creditors holding claims prior to said sales are cut off and forever barred.

7th. A judgment of the District Court of Harrison county, Texas, rendered March 14, 1872, in a suit filed fifth September, 1871, by Southern Pacific Railroad Company vs. V. K. Stevenson and W. B. Grubbs, by publication, and annulling the said construction bonds and the said mortgages their securities, which has been plead in bar, has been removed by writ of error to the Supreme Court of Texas, reversed and remanded to said District Court, December 28, 1874, and by agreement stands over in said Court to abide the result of this suit. (See Record page 180.)

8th. That the Texas and Pacific Railroad Company, by reason of the several sales of the Southern Pacific Railroad and its property, the judgment of the District Court of Harrison county, Texas, annulling the bonds and delay in asserting his claims, and of the several acts of the Legislature of Texas and of the Congress of the United States, concerning the said Southern Pacific Railroad Company and the Texas and Pacific Railroad Company, and the stipulation in the deed of conveyance from the Southern Pacific Railroad Company to the Texas and Pacific Railroad Company for three million dollars, twenty-first March, 1872, is an innocent purchase in good faith without notice of Complainant's demands.

These are substantially all the defenses presented by the several answers of Defendants.

If the admissions of Defendants, made in the answer and amended answers, are considered in their full scope and legal effect, the Complainants holding the bonds might well *rest* on the production of their bonds, signed by V. K. Stevenson, President, and D. C. Wilder, Treasurer and Secretary, under the seal of the Company, and countersigned by V. K. Stevenson and R. V. Richardson, trustees, the bonds and coupons being to bearer,

with the recitations in and upon the back of the bonds. These bonds, with their recitations, being commercial paper, import absolute verity. The admissions of Defendants, in their pleadings, virtually yield the whole ground covered by their defense, and leave but little room for controversy over the validity of the bonds. Special attention is directed to the admission and existence of all acts, both State and Federal, concerning the Texas Western Railroad Company chartered sixteenth February, 1852, the changing it to the Southern Pacific Railroad Company, August 16, 1856, and every subsequent act to the date of filing Complainant's bill; (see Record, pp. 61-2); that the general and interest mortgages were recorded as alleged; (see Record, pp. 62, 73, 164); that the Company had completed fully twenty-five miles of road, and had acquired 256,000 acres of land prior to twenty-fifth of August, 1860; (see Record p. 64); that the books of the Southern Pacific Railroad Company show the resolutions authorizing the bonds to be issued by the directors and stockholders; (see Record, p. 63); that V. K. Stevenson was appointed President of the Southern Pacific Railroad Company sixth of August, 1860, as appears by the books of the Company, and that he was elected a director; (see Record, pp. 156-7); that Jeptha Fowlkes was appointed general financial agent, and an executive committee were appointed sixth of August, 1860, consisting of V. K. Stevenson, Sam Tate, R. V. Richardson, Chas. McDermott and J. Fowlks, with vast powers; (see Record, pp. 157-8); that the Texas and Pacific Railroad Company and the Southern Pacific Railroad Company consolidated twenty-first of March, 1872; that all the property of the latter passed to the former, and that the Texas and Pacific Railroad Company assumed all the indebtedness of the Southern Pacific Railroad Company, provided that the same did not amount to a greater sum than "the cash value of the assets received from the same;" (see Record, p. 5); that the consideration agreed to be paid was three million dollars. (See Record, p. 28).

It will be remembered that the Defendants do not deny or pretend that under the charter, the Company had not the un-

doubted right and authority of law to issue such bonds as sued on, and to create indebtedness by issuing bonds secured by mortgage. Bonds issued by a railroad company and payable in blank, secured by a mortgage to trustees, are negotiable securities. (See White vs. Vermont & Massachusetts R. R. Co., 21 How, 575; Mercer Co. vs. Hackett, 1 Wall, 83; Gilpeke vs. city of Dubuque, Id., 476, 306; Bronson vs. LaCrosse R. R. Co., 2d Wall, 283; Stocks, 667, 699, 2 Hill, N. Y., 177; 8 Paige, 527; 3 Kern, 625, Penn., 418; 31 Miss., 216.)

Coupon bonds, payable to bearer, pass by delivery, and a purchaser of them in good faith is unaffected by want of title in the vendor. The burden of proof on the question of such faith is upon the party who assails the possession. (See Thompson vs. Lee county, 3 Wall, 327; Murry vs. Lardner, 2d Wallace, 110; 20 How, 342; 22 Id., 96; 1 Burr, 452; 3 Id., 15, 16; 2 Dougl., 633; 16 Pet., 1; 4 Adolph and E., 870; State vs. White & Childs, 25 T. R. Sup., 610; Evans vs. Cleveland R. R. Co., 2 Pittsburgh, Pa., 483; Wheeler vs. Greneaux, 6 T., 525; 1 T., 183; 2 T., 397).

Bonds, with coupons annexed, payable to bearer, issued by a county or other municipality, containing recitals showing that they were regularly issued under authority of law, estop the county from contesting the legality. They are to be regarded as commercial securities, and the holder of them has a full title, and against one who has taken them in good faith, the county cannot set up eqdities which might have been available against the original payee. (Moran vs. Commissioners of Miami co., 2 Black, 722, 724, and authorities cited.)

When a corporation has the power to issue bonds, and they are drawn payable at an earlier day than the ordinance or authority prescribes, still they are good and collectible. (See Gilchrist vs. Little Rock, 8 Cir., Ark., 1 Dill, 261, in point, p. 1533, note 1397, P. D., vol. 2).

These authorities, with the cases referred to in them, are exhaustive of the subject of bonds and coupons issued to bearer, and in the hands of third persons. The bonds on delivery pass

the title and the production of the bonds makes out the case for the holder at the trial, and fully meets the general denial of Defendants. The recitations in the bonds themselves and those on the bonds are proven by the production of the bonds, the Company issuing them is estopped in *pais* from denying them. Having issued them and put them upon the market for value, the Company shall not be heard to say that they are irregularly and illegally issued. The Company shall not take advantage of its own wrong. Can this corporation be heard in a court of equity to say that its own books were fradulently kept, that the resolutions and by-laws authorizing the creation of this indebtedness were passed beyond the State of Texas, and therefore unlawful and void? After the Company has involved others by putting them in market and inviting large investments of capital in them, and reaping the profits of such sales, shall it be permitted to shield itself under such subterfuges?

It will be observed that the Defendauts do not deny that the Company was fully organized and in constant operation during the period that Complainant was President, with a full complement of directors and officers, in fact this is admitted and shown by the evidence and pleadings of both sides, nor is it denied that every officer, save the President, was legally elected and performed his duties to the satisfaction of the Company, and that every official act was in accordance with the strict requirements of the rules and by-laws of the Company, during said period. It is only V. K. Stevenson, the President, who was not legally the President of the Company, and his acts that were unlawful and void. Under the view we hold of this case it does not matter whether he was legally appointed or elected President; whether the stockholders and directors met in or out of Texas when they passed upon the subject.

The true question is what did the Company try to do in regard to him; what was the intention; was it to make him President? If this was the intention, and he accepted the position, and acted for the Company in that capacity, and the Company accepted such services, or remained silent and acquiesced, and did not re-

pudiate him, the Company is bound by his acts. If he was not in fact the President of the Company, yet acted as such, and brought gain to the Company and it accepted the benefits, and acquiesed, though silently to these open acts, they will be binding on the Company. And though the Company did not have a President *de jure*, nor *de facto*, but used the name of one unknown as President to negotiate paper, coupled with the names of other officers whom the Company recognized, with the seal of the corporation, it is submitted that still the obligations would be as binding on the Company as if the name used actually represented the veritable President of the Company. The Company may create an agent verbally or in writing under the seal or without the seal, or it may accept the acts of one who assumes to be agent, never in fact appointed at all; in all such cases the silence of the Company when advantages are being received, is an acquiesence that will bind the Company. It does not matter by whom the acts are done, in the preparation and perfecting negotiable paper, so it is done in an acceptable manner and used by a corporation, it will be binding. Attention is directed to the extent the Courts of the country have gone in upholding agencies of corporations and the reasons therefor. The agency may be inferred from their acts, though no vote, resolution, or seal be used. 22 Cal. 28; 8 Danna (7 N. Y.) 114; 26 Me. 428; 1 Md. Ct. 392; 1 Dougl. (Mich.) 106; 4 Cow (N. Y.) 645; 29 Mo. 250.

The President and General Manager of a Railroad Company may execute a mortgage on personal property for the road without a formal vote of the Company. Such an act with the knowledge and concurrence of the directors, or their long acquiesence makes it valid. Sherman vs. Fitch 98 Mass. 59; 1 Gratt (Va.) 374; 32 Vt. 633.

A corporation created to construct a railroad has the implied power to borrow money, although the charter should prescribe some other and different method, such as by subscription, and if the agents of the Southern Pacific R. R. Co. borrowed money in a different manner from that directed in the charter and by-laws, as by bonds and otherwise, it is binding. Union Bank vs. Jacobs 6 Humpp. (Tenn.) 515; 21 How. 414; 2 Conn. 260; Id. 252.

Even acts done by a corporation in violation of its charter are not necessarily void. It may by such acts acquire title to property and transmit it to others, and this will be sustained by the Courts. Farmer's Bank vs. Detroit and R. R. Co. 17 Wis. 372.

A by-law of a corporation broken by a member of the Company, yet afterwards assented to by all, is a waiver of such by-law. 5 Minn. 36.

A corporation which has notice of the illegality of an election of its officers, yet by its officers meets at the regular meetings held subsequently, acquiesces in and ratifies such illegal acts. State vs. Lebori 7 Richt. (S. C.) 234.

With these authorities before us, suppose that every averment of Defendants concerning the illegality of the election of Stevenson as President was admitted that he did not own stock, was not a director, resided out of the State of Texas, and the action of the directors in attempting to appoint or elect him was held out of the State, still these acts were at most irregular or unauthorized, and no one of them, or all combined, are sufficient to defeat these negotiable securities in the hands of third parties. And this, too, if the Company had made objection; but when it remained silent for many years, accepting the benefits of Stevenson's acts, its silence is a ratification, and the Company is estopped from setting up such defense.

As between third parties and the Southern Pacific R. R. Co., it does not matter how many irregularities existed in getting up the bonds and negotiating them; nor, in fact, who were or were not the officers of the Company, the *bona fide* holder for value is beyond the reach of all such defenses.

But it is charged by Defendants that V. K. Stevenson assumed to be President and entered into a fraudulent combination with R. V. Richardson and Jeptha Fowlks in executing said mortgages and construction bonds to swindle the Southern Pacific R. R. Co. and others. (See R. p. 65, 66.) And as Complainant was cognizant of all the acts of the Company in executing and negotiating the said securities, as the holder of a considerable amount of them, he would no doubt be liable to such equitable defences as might

exist in favor of the Company. Therefore we will endeavor to show that the Complainant was the President of the Southern Pacific R. R. Co., as alleged in his bill, and that there was no fraud combination or collusion in this or any other business of the Company by himself or with others, that all was conducted with the utmost fairness, and to the advantage of the Company.

Was V. K. Stevenson, the Complainant, ever President of the Southern Pacific Railroad Company ?

If the naked allegations of the Defendants solemnly sworn to are to be believed, he never was President. But Courts of equity have learned doubtless to distrust such sweeping declarations prepared by counsel and sworn to without scruple by the agents of corporations.

Let us first examine the evidence furnished by the Defendants themselves on this subject. The books of the Company, the resolutions of the directors and stockholders, and reports of the officers everywhere, with unbroken unanimity, declare he was President from sixth of August, 1860, till the third of September, 1861, and recognized him in resolutions as late as February twelfth, 1866. See resolutions in R. p. 853 to 869 inclusive; report of Company by its General Superintendent, C. E. Hynson, and A. T. Smith to State under oath August 31, 1861, R. p. 99; cross examination of E. A. Blanche, chief engineer, and witness of Defendants, R. p. 258 and 259, he says: "I met V. D. Stevenson in the city of New York in company with Dr. Jeptha Fowlks in October, 1860. V. K. Stevenson at that time claimed to be President and was acting as such, and I as chief engineer and Jeptha Fowlks as financial agent, recognized and treated him as President, and he was so recognized in the general operations of the Company. I only knew the time he seemed as President from the records, which show that he was appointed the sixth of August, 1860, and so continued until the sale of September third, 1861." Testimony of A. T. Smith, secretary of Southern Pacific R. R. Co., and witness of Defendants, see R. p. 275 and 270, says: "I consider that V. K. Stevenson was not elected President, but rather appointed as such by the Board of Directors at Marshall,

at their office, as is shown by the records." Deeds or mortgages executed by direction of the Company, see R. p. 39, 40, 41, 42 and 43. The construction bonds signed by the President and Treasurer, by direction of the Company, see R. p. 10. Testimony of R. W. Loughery, a witness of Defendants, R. p. 280 and 281. By resolution and instructions given by the Southern Pacific R. R. Co., twelfth of February, 1866, recognized V. K. Stevenson to have been President, R. p. 617, 618, 619-20.

These repeated recognitions of V. K. Stevenson by the books, resolutions, directors, reports and correspondence of the Company furnished by the Defendant's own evidence would seem to be sufficient to satisfy the most skeptical mind. But as the defendants deem this a vital point, we will bring to bear the direct and positive testimony of the witnesses for Complainant. C. E. Hynson, who was superintendent of the road, before, while and after Stevenson was President, proves it in the clearest manner, R. 212, 213 at bottom, 214 at top, 215 middle of page, and 217. James Turner, attorney of the road from 1860 to the institution of this suit, at different times R. 218 bottom, and 219 at top of page. J. M. Waskom, a stockholder in 1860, director in 1861, and President in 1867, R. 229 middle, and 235 bottom. W. T. Scott, one of the incorporators of the road, stock holder, director and Vice President in 1860-61 under Stevenson's administration, R. 240 near bottom of page, is positive and direct in his proof. H. S. Fulkerson, agent of road and purchaser at sale of 1861, R. 737. George H. Giddings, one of the incorporators of the road and agent of the Company in 1859-60-61, proves the fact, R. 531-2. Andrew DeGraff, a contractor under J. Edgar Thompson and Stevenson's administration, is positive to the fact, R. 520-521. W. H. Smith, contractor under Thompson and Stevenson as Presidents, is explicit on this subject, R. 480 bottom, 489 top, 490, 491 top and bottom, 492, 493 bottom, 501 top, 504 middle, 507 middle and 508 middle. And V. K. Stevenson, R. 536 middle 537; see question and answer 560, 561-2-3-4, and particularly 562, 563 and the exhibits referred to; read exhibit Z 658, Z 4-661-2, Z 19 to Z 29, 673 to 679. These instances, ex-

tracts and correspondence prove in the most positive and emphatic manner that Stevenson was the President of the Southern Pacific R. R. Co. from August 6, 1860, to September 6, 1861. If he was not the President during this time who was? Jeptha Fowlks, by resolutions of August 6, 1860, was clothed with the power of the President so far as he could be, but this did not recognize him as President or pretend to do so. On the contrary, his duties were marked out in the same resolutions as well as those of the President, Stevenson.

But the Defendants under such overwhelming evidence still say in effect, that Stevenson could not be the *bona fide* President for these reasons, to-wit.

1st. Stevenson was not a stockholder as appears from the books and could not become a director.

2d. He was never elected a director, and could not be made President.

3d. That if he became President at all it was by appointment, and not by election as required by the by-laws.

4th. That by the laws and by-laws the President was required to reside in the State, and his failure to do this rendered him ineligible as President.

If there was any force in these four propositions they are easily answered by the evidence & the by-laws and resolutions of the Company. We answer to the first: Stevenson owned 49 shares of stock in the Southern Pacific R. R. Co. in 1857. Exhibit S. R. 625 et seq.; this stock was admitted to new company in 1859, twenty-eighth September; R. 836, and this act itself was ratified October 3, 1859, R. 846 top of page. Stevenson, in May or June, 1860, bought of Jeptha Fowlks 100,000 of stock in the Company, R. 538, 539, 540. Fowlks owned this amount of stock September 28, 1859, R. 834. And by resolution 7, of October 3, 1859, R. 848, the Secretary of the Company was ordered to issue to Fowlks 100,000 shares of the stock to be sold, and Fowlks did sell this amount to Stevenson, R. 575. To the second proposition we answer, Stevenson was appointed a director August 6, 1860, R. 858, resolution 26. By the 11th Article of the By-Laws, R. 838, the Board of Directors were fully em-

powered to appoint or elect, and these resolutions were passed at Marshall Texas. Also, see Stevenson's testimony, R. 537, at bottom, 539 at top, and C. E. Hynson's evidence, R. 215 middle of page.

To the third proposition, we answer Stevenson was appointed to fill the vacancy occasioned by the resignation of Thompson as President, by the Board of Directors, August 6, 1860, resolution 9, R. 857. This action was lawful and proper by virtue of Article 11 of the By-Laws, R. 838, made in pursuance of the charter, Sec. 5, p. 56 of the copy filed with this Company. The power to appoint or elect to office or vacate an office was given to the Executive Committee by resolution 21, on August 6, 1860, R. 858.

To the fourth proposition we answer that the President was not required to reside in Texas by law, P. D. Vol. 1, Art. 4910, Art. 5 of By-Laws, passed October 3, 1859, R. 838, nor by resolution 23, of August 6, 1860, R. 858.

At this late date the presumptions of law would be that all acts of the officials of the Company were done in a lawful manner, and, if so, that Stevenson was a stockholder, duly elected a director, and duly elected as the president. But having the most abundant proof on these points we have submitted it for the purpose of showing that the Complainant acted in the most open and legal manner, in all his acts, and that the officers of the Company, during the period he was President, recognized and treated him so in all their official acts.

We next consider the question: Did the Southern Pacific R. R. Co. have the power to borrow money on bonds, and to execute deeds of mortgage on its property, franchise and chartered rights to secure the same with trustees? And, if so, did the Company legally and rightfully exercise such power in the execution of the bonds and deeds of mortgage in this case?

By the charter of the Texas Western R. R. Co., approved February 16, 1852, which was subsequently amended and called the Southern Pacific R. R. Co., sections 1-5, p. 56, the power to execute deeds of mortgage and borrow money is given, and it is given by implication in the general act of August 13, 1856, to

provide for a special school fund charter, p. 68. And by general laws P. D. vol. 1, Art. 4911, 4912, 4913, 4914, and also see an exhanstive opinion on this power. Galveston R. R. vs. Coudry, 11 Wallace, 473-4-5.

In pursuance of this undoubted power the Company proceeded to put itself in a condition to properly exercise this power. By enacting a by-law October 3, 1859, see Art. 14, R. 838. Also by passing a resolution of the stockholders and one by the board of directors, fully designating the manner of issuing construction bonds and executing deeds of mortgage with trustees on the property and chartered rights of the Company to secure the same, October 5, 1859, R. 846, 847. And by passing resolutions August 6, 1860, on the same subject, more in detail see resolutions 3, 4, 5, 6, 19, 29, R. 854, 855, 827 and 848, and at the same time having submitted to the board of directors the deeds of mortgage here in controversy and approving them.

Having the power to act on this subject, and having fully prepared to carry such power into effect, did the Company through its officers fairly and honestly exercise it? It is not denied that the genuine signatures of Stevenson, R. V. Richardson and D. C. Wilder appear to the bonds and deeds of mortgage. It is not denied that D. C. Wilder was the *bona fide* secretary and treasurer of the Company at the time of signing the same, and was acting within the scope of his duties; nor that R. V. Richardson and V. K. Stevenson were selected as the trustees in the mortgages under resolution 3, passed August 6, 1860, R. 854; or that the bonds and deeds of mortgage were properly sealed with the true and genuine seal of the Company, as selected by resolution 21, R. 857. The actual execution of the bonds if denied is fully proven by C. E. Hynson, R. 214, 215, by W. H. Smith, R. 496, 497, and by testimony of V. K. Stevenson, R. 547-8, to execution of bonds and deeds of mortgage, R. 547, and by the deeds of mortgage themselves. It will be remembered that the policy of issuing construction bonds and executing deeds of mortgage on the road and its property were adopted October 3rd and 5th, 1859, as seen in the resolution R. 846-847, Stevenson's testimony, R.

547. And under this policy J. Edgar Thompson in the contract to construct the road twenty-third day of June, 1860, see R. in Smith's case, No. 69, p. 73, stipulated that a part of the contract price should be received in the bonds of the Company to be issued, testimony of W. H. Smith, R. 497. And on the sixth day of August, 1860, the deeds of mortgage in this case were actually submitted to the board of directors and agreed and approved, which were actually signed by the President and other officers August 25, 1860, and the bonds which had been already prepared and engraved, were submitted to the new President, Stevenson, and signed September 1, 1860, R. 547, 854. The bonds when executed were turned over by Stevenson to D. C. Wilder, Secretary, and Jeptha Fowlks, Financial Agent, R. 547. And the deeds of mortgage when executed were delivered to D. C. Wilder, the Secretary, and he directed to have the same recorded immediately in Texas. This was not done in the absence of the President to France, by order of Jeptha Fowlks, but they were duly recorded in Texas, March 1, 1861, as the certified copy proves. There was no fraud or cullusion in delaying the recording of them, R. 548. It should not be forgotten that the principal witnesses, Jeptha Fowlks, D. C. Wilder and R. V. Richardson, are all dead, and but few are living who witnessed these transactions.

The deeds of mortgage having been properly executed and recorded, and 350 of the bonds issued and delivered to the Company, the Company did negotiate and use the said bonds for a valuable consideration.

In the latter part of November, 1860, Jeptha Fowlks, Financial Agent of the Company, sold and delivered ten of said bonds to W. H. Smith, for DeGraff & Smith, contractors, at par, less the first ten coupons cut off by Fowlks, R. 481.

J. S. Holman, Vice President of the Company, in the latter part of May or June, 1861, sold and delivered to W. H. Smith, for DeGraff & Smith, twenty of said bonds at par, on their contract, R. 486–505.

C. E. Hynson, Superintendent of the Company, received three of said bonds from D. C. Wilder, Secretary, after April, 1861,

one of which he used as collateral security with G. G. Gregg, in Marshall, Texas, for supplies, and afterwards lifted it and returned it to the Company, R. 214–215.

Jeptha Fowlks told Hynson that I. W. Authur, of New Orleans, would take the bonds as collateral for ten or twelve thousand dollars of supplies, and H. S. Fulkerson did send up supplies under this arrangement, and Hynson saw Fowlks have a lot of these bonds in New Orleans, April, 1861, R. 215. The Company used ten of these bonds with Joslin, of New York, as collateral for a loan of $2,500, 1860. Also used 12 of the bonds with Murray F. Smith, as collateral security, for a loan of $3,000, 1860. Also used 48 of these bonds as collateral security, with Gebhardt & Schuctard for a loan of $30,000, R. 550.

Dr. Fowlks used 25 of these bonds as collateral security, to get supplies in New Orleans, 1861, in sums of 12, 10 and 3, R. 551.

One hundred of these bonds were sold by the Company to complainant in the spring of 1861, for over $42,000. Dr. Fowlks offered these bonds to G. H. Giddings, in 1861, to secure $3000, R. 531.

Two bonds owned by J. D. Arundel, bought Jan., 1872, R. 173.

One by James H. Gilliam, R. 174.

Twelve by George F. Flournoy, R. 176.

Ten by R. W. Hyman. See pleadings lately filed.

All the last named bonds sued on in this bill.

We will next inquire into the indebtedness of the Southern Pacific Railroad Company to V. K. Stevenson, and firstly as to the one hundred bonds of one thousand dollars each with all the coupons attached. We have established the execution and validity of the bonds and the deeds of mortgage, as well as their recognition and use by the Company, and now propose to show that Complainant paid a valuable consideration for the bonds. V. K. Stevenson was employed by the Company as agent, to lend his influence and weight, as a rising and influential man, in procuring the desired legislation for the Company from the Congress of the United States, and to perform other duties at a salary of $30,000 per annum, about the first of August, 1859, R.

536, 553. He continued as such agent until elected as President, August 6, 1860; so the Company owed him $30,000 before he became President. The salary of Complainant was not changed by his election to the presidency, but continued at the same rate until about June 6, 1861, making for this ten months $25,000, or a total of $55,000, due him for past salary without interest, on June 6, 1861. At this date a new contract was made, by which he then and there agreed with the Company to accept in consideration of two-thirds of his salary, past due and to become due while he should act as President, one hundred construction bonds, the same described in Complainant's bill, R. 570, 571, 574 and 551. This contract was made with the Executive Committee and financial agent; in their presence and by their direction the bonds were delivered to Complainant, R. 552; see testimony of W. H. Smith, R. 501. By this contract it will be seen that Complainant paid for the bonds two-thirds of $55,000, making $36,666, and the interest at 7 per cent., figured semi-annually, as it was to be paid, makes $2,139, added makes a total of $38,803, which sum he actually paid in what was the same as cash. And by it remitted two-thirds of his salary yet to accrue while President; and he did continue acting as President till the 6th day of September, 1861, when the new organization was effected, and J. S. Holman was elected President. So that two-thirds of $30,000 per annum of salary to come due for the three remaining months, making one-fourth of $20,000 or $5,000, which, added to the consideration of $38,803, actually paid, making a total of $43,803, the consideration paid for the bonds. And this at a time, too, when the Company was borrowing money on the bonds, using $4,000 of bonds as collateral for $1,000 cash received. At this date, after taking the one hundred bonds for the two-thirds of $55,000 then due, there remanied a balance due him on the salary of $10,000 per annum since August 6, 1859, of $18,333, less the credit of $6,000 received, as shown by his account, R. 52, leaving $12,334 besides interest.

Complainant was employed as agent by Dr. Fowlks, R. V. Richardson and Sam Tate, R. 569, 570, and their first and only proposition was $30,000 per annum salary, R. 57 and 571 at bot-

tom. The Executive Committee had the authority to make this contract; see By-Laws, Art. 38, R. 482; Jeptha Fowlks was also authorized to employ Stevenson as agent; see resolutions of November 24, 1859, R. 853, 567.

Fowlks, Richardson, Tate, McDermott and Stevenson were appointed an Executive Committee with all the powers of the board of directors, by resolution eighteen, passed August 6, 1860, R. 857. From this it follows that the one hundred bonds were delivered by the Company, having full power to do so, for a valuable consideration paid by Complainant. And this establishes the Complainant's demand on the one hundred bonds and coupons.

It is charged that the salary of $30,000 per annum agreed to be paid was too much and unreasonable, in view of the fact that so little of the road was completed, and the earnings of the road were so small. But when it is considered that the road needed more energetic and skillful management at this date than it likely ever would again, and the work required of Stevenson called for the highest exercise of skill, judgment, prudence and influence, the salary will appear not only reasonable, but small. It is said that Thomas A. Scott, Garrett and Julian receive from $40,000 to $175,000 annually, for services requiring no greater skill and labor, R. 809. The Company expected on the employment of Stevenson to procure material aid for their enterprise, and that the work from Marshall, Texas, to the Pacific Ocean would be put under contracts and be pushed to rapid completion. And but for the unfortunate civil war that interrupted the contracts with Bellot, DeMeniers & Co., and Peabody & Co., all this would have been accomplished; R. 537, 537, 561, 569; testimony of W. T. Scott, R. 240, 241; testimony of W. H. Smith, R. 496 at top, 490, 491. And see exhibits Y 1, 2, 3, 4, 5, 6 and 7, R. 654 to 657; also, contracts No. 1, 2 and 3, R. 604, 608, 638, 540, 545, 546; also, exhibits U U, 1, 2, 3 and 4, R. 640 to 645. These show the reasons for, and the importance of, employing such a man as Complainant.

We will next consider the account of the Complainant, its justness and correctness. The account as rendered R. 52 and 53,

amounted, to March first, 1873, a balance due of $46,538.58; for proof see testimony of Complainant, R. 553, 554, 555, 551, 552, 536 at bottom, 570 at top, 571 at bottom, 573 at top. The item of credit mentioned on account R. 53, of $3,750 with interest to March 1, 1873, $3,949.30, making a total of $7,699.30 is an error, as shown by the testimonv of Stevenson, R. 554; this item should be stricken out as a credit, and added to the bill of $46,538.58, making $54,257.88; thus the account stands to March 1, 1873, with interest at 8 per cent. since that date.

Is this account barred by limitation?

For so much of the account as relates to salary there is a written obligation of the Company; see resolution 14, R. 850. This obligation to pay $10,000 salary per annum is not abrogated by the contract to pay $20,000 additional. The contract to pay $10,000 was fixed and not changed, as recognized by the Executive Committee about June 6, 1861, when the one hundred bonds were paid Complainant, then and there the $10,000 per annum was agreed to stand for the past and future to be paid in cash; the balance of salary was paid by the one hundred bonds. So much then of the account as relates to the salary is not affected by the statute of limitations of two years, which is plead by Defendants, R. 551, 552, 553, 554. That portion of the account not composed of salary is for money advanced as traveling expenses for and on behalf of the Company by Complainant, as the agent and President of the Company. This is not barred by the statute of limitions of two years, the statute did not begin to run until March 30, 1870, and there were unsettled accounts between Complainant and Defendants; and the statute did not begin to run until the agency was officially terminated or demand made by Defendants or Complainant for settlement. No notice was given Complainant of a termination of his agency, R. 555 top of page, nor was any demand or offer of settlement made by Defendant. The first demand for settlement was made by Complainant April 12, 1873, R. 45, 46, and the filing of his bill April 16, 1873. As between principal and agent the statute does not run in such case till the legal termination of the agency or demand made for an accounting, and hence the account is not barred. Statute of limitations

does not begin to run until a demand has been made of the agent by the principal. Middleton vs. Watson, 1 Rawle 330; Copeland vs. Mercantile Insurance Company, 6 Pick 204; Merle vs. Andrews, 4 Texas 216; Scott vs. Mason, 36 Texas 164; also, fraud suspends the statute till its discovery, sec. 24, T. 345; 18 T. 774; 8 T. 361; 21 Wallace, Baily vs. Glover, p. 346, with other items cited in each case.

We now proceed to the investigation and proof of the three ten thousand dollar notes negotiated by the Company and endorsed by Complainant, and paid off by him about the twenty-fourth of January, 1866, and held with the forty-eight construction bonds as collateral security, as a just liability against the Defendants. These three notes after being paid off January twenty-fourth, 1866, were sent by express to Messrs. Ayers & Calhoun, attorneys, to collect the contributive share from Jeptha Fowlks as co-endorser and lost in *transitu*. And a copy is offered in evidence, see exhibit D, R. 47, 48, 49, 50; see oath of Stevenson to loss, R. 51; see correction of error as to sending them off in date, showing it January 24, 1866, instead of April 20, 1866, R. 558, 559; also see exhibit W W, 1, 2 and 3, R. 647 to 651. The signatures to the exhibits proved to be genuine, R. 559, 560. And especially examine exhibits W 2 and W 3, showing the loss of notes and how. The genuineness and correctness of copies, in addition to the notorial act and certificate shown, R. 556 and 557; also, the error in notorial copy of one of the notes, making it $1,000, when it should have been $10,000, R. 559.

The execution, endorsement and negotiation of these notes is proved by Stevenson, R. 550, 551, 555, 556, 558, 560, 577, 581, 582. The existence and payment of said notes shown by testimony of W. H. Gebhard, R. 534, 535; also, the existence, negotiation and payment of the notes proved by Jean DeGhoee, R. 523 to 530, inclusive. The Defendants finding that the witness, Jean DeGhoee, knew all the facts concerning this indebtedness, and that he would establish the claim against the Company, made the most extraordinary efforts to discredit his testimony. They resorted to the very unusual and equivocal expedient of introducing its own counselors as witnesses, and this led to the introduc-

tion of evidence in rebuttal, showing the manner and unfairness of the examination by Defendants of this witness, and his unblemished character for truth and veracity. The whole evidence on this subject is referred to in testimony of Wm. Stedman, R. 722 to 725; of F. B. Sexton, R. 729 to 731; see testimony of W. H. Butler, V. K. Stevenson, W. H. Smith, Jean DeGhoee and Lawrence Wells, R. 811 to 829, inclusive. It is submitted this evidence shows beyond question that the witness bears a high reputation for truth and veracity, and is entitled to full credit for every utterance he made as a witness. Instead of discrediting him as a witness, it must produce the effect upon the candid and impartial mind that the man bearing such a character is wholly incapable of giving false evidence or testimony, influenced by the hope of any reward other than the consciousness of having discharged a solemn duty. The execution, negotiation, collateral security and endorsement, all proven by W. H. Smith, R. 480, 490, 491, 504, 513, shows that he received $9,000 of the money borrowed on the notes. The same is circumstantially shown by E. A. Blanche, a witness for Defendants, R. 259, 268, at top of page. Complainant had the most ample authority to execute the notes, endorse and negotiate them under the cash policy adopted by the Company, R. 855, 856, by resolution 6, 13 and 14, passed August 6, 1860.

The negotiation could not be effected without the endorsement of Stevenson and J. T. Soutter, and Soutter would not endorse without the 48 bonds were put up as collateral security with Complainant, and to effect the loan this was done by the Executive Committee before the notes could be discounted by Gebhardt & Schuctard, R. 560, top and bottom, and 551 at top of page. The Executive Committee, to secure this loan and the endorsement of J. T. Soutter, delivered the 48 bonds to Stevenson, to be held as collateral security for the benefit of the bank discounting and J. T. Soutter. The amount of three notes of $10,000 each, with 7 per cent. interest since April 15, 1861, to January 24, 1866, date when Complainant paid off the same, four years, nine months and nine days, makes $10,026 interest, with notarial fees of $7.50 for protest of three notes, aggregated January 24, 1866,

$40,033.50, with seven per cent. interest on said sum since January 24, 1866; to November 24, 1876, ten years and ten months, makes $30,358.83, agggregating a total of $70,392.33 on November 24, 1876.

The statute of limitations of two nor four years will avail as a defense, because Complainant had the right and did sue on the contract itself, April 16, 1873; see 19, T. R. Sublett vs. McKinney, 438, a leading case; also, Jordan vs. Hudson, 11 Texas 82; Mitchell vs. DeWitt, 25 T. Sup. 180, Duty vs. Graham, 12 T, R. 427; and Semkin vs. Mills, 4 Ga. 344. Note 1072, P. D. vol. 1, p. 803, arts. 4787-8-9, which exhausts the subject.

Inasmuch as we intend to consider the case of W. H. Smith as consolidated with the case of Complainant, we will next inquire into the claim of W. H. Smith as described in suit No. 69.

The demand of Smith consists of 30 construction bonds of $1,000 each, with all the coupons attached except the January coupons for 1861, on the first ten bonds received, which were cut off by the Company before delivery to Smith. In the contract between J. Edgar Thompson, President of the Southern Pacific R. R. Co., and DeGraff & Smith, dated twenty-third day of June, 1860, see record in W. H. Smith vs. Texas & Pacific R. R. Co. *et al*, No. 69, pp. 55 to 78, it is stipulated and agreed that Smith is to take a certain proportion of the contract price for the work of constructing the road in these bonds thereafter to be issued, R. 496, 497.

The testimony of Smith shows that he received the thirty bonds for the work of DeGraff & Smith, and in payment for the same and on the contract, the first ten from Jeptha Fowlks and the 20 from Vice-President J. S. Holman, R. 481, 482, 485, 486, 487, 496, 497, 505, 506, 509.

The bonds were transferred to Smith by DeGraff on settlement, to sue on or use, R. 511, 512, 513, 517. From the first ten bonds Dr. Fowlks cut the first coupon off before delivery, because he said the Company could not meet the first due coupons, R. 485.

It is claimed by the Defendants that Smith & DeGraff were settled with about July 2, 1862, and that it was a final settlement,

therefore the Company owes him nothing. The proof shows clearly that the Company paid Smith from time to time such sums as it could command, of cash, bonds and supplies, until the work was completed, and that on a final settlement the Company was disposed to repudiate the debt and obligation, and but for J. S. Holman, the President, they doubtless would. The Company on final settlement, by way of compromise, paid him for DeGraff & Smith $25,000 in money, bonds, stock and land certificates, and he signed a receipt in full under protest, losing thereby $244,280, for work and labor done for the Company, R. 482, 483, 484, 485, 479, 495, 503, 504. The settlement of a balance due on contract did not in the least affect the previous payments made to DeGraff & Smith. The bonds received as payment do not fall due till 1883, and surely no one but the ingenious counsel for the Defendants could have supposed that the receipt for settlement of final balance due July 2, 1862, was given in full settlement of the bonds received prior to that date, which amounted to $30,000 and interest. This position seems preposterous in the extreme. A. T. Smith actually made the settlement with Smith, drafted the receipt and was Secretary *pro tem*, and a witness for Defendants. He says. "It was my understanding that the settlement made on July 2, 1862, was a settlement of the final balance due him," R. 276, 277. See Scott's testimony, R. 241.

This settlement was no doubt for work done for the new Company since sale, September 3, 1861, as the directors refused to settle in full; and, if so, all that was due prior to that date by the old Company, was never settled.

DeGraff proves that Smith received the 30 bonds in payment for work under contract, R. 520. Stevenson proves that the ten and twenty bonds were paid DeGraff & Smith by the Company, and the same reported to him, R. 551. By this evidence W. H. Smith is shown to be a holder of the 30 bonds and coupons described for full value paid the Company, and is an innocent holder without any notice of defect of title, or of any defect such as charged in Defendants' answers, and therefore is not affected by such, if any defect had been proven. But Defendants have contented themselves with making charges and swearing to

them generally through an official of the Texas & Pacific R. R. Co., who could not know a single fact denied, except from reputation or advice of counsel. No proof of actual fraud, combination or collusion between Complainant or any other person and the officers of the Southern Pacific R. R. Co. during the period of his administration, has been proven. On the contrary, nearly every witness emphatically swears that there was no fraud or unfairness on the part of the officers of the road in regard to the creation of this indebtedness. Smith's claims stand in the same situation as all the other holdess of the bonds, except Complainant; they are all innocent holders of these bonds for a valuable consideration paid; and negotiable paper in the hands of third parties for value cannot be affected by any defense set up by Defendants, which might reach Complainant.

But Complainant has clearly shown a good tittle without taint of fraud or unfairness to his 100 bonds, having paid a full and valuable consideration therefor. He has proven beyond cavil that the three ten thousand dollar notes were legally and rightfully executed and negotiated for the Company; that $30,000 in cash was received by the Company on them; that the 48 bonds described were put up as collateral security to secure this loan; that he was endorser by request of the Co.; that the notes were protested, and he paid off the same, subsequently took up the notes and securities, and has sued on his contract and fully shown it to be a subsisting liability against the Co. Complainant has also shown by proof his account and proven every item of it, and that the same is a just claim against Defendants.

Having established our claims against the Defendants, we shall next enquire if the defenses set up are sufficient to prevent a recovery on any part of these claims.

The Defendants have plead several sales of the S. P. R. R. since the inception of our demands, and that the legal effect of these sales is to cut off such claims and extinguish them. We will consider the effect of these several sales: First, upon the construction bonds, and next upon what may remain of the debt Complainant paid off as endorser after the proceeds of the 48

bonds shall be applied on it, (if any remains), and the account for salary and expenses.

The sale of third September, 1861, was not a valid sale. It was made by the Company to the Company, and was a fraud upon all those who held claims or stock in the Company whose interests were not recognized. By a short review of the testimony it will be seen that this sale was a mere sham, agreed to by the officers of the Company—brought about by them with a view of cutting off Northern creditors and stockholders, and to prevent the Receiver of the Confederate States from sequestering and selling the interest of the Northern creditors and stockholders, and becoming the owner of the largest interest in the road.

C. E. Hynson, the then Superintendent of the road, says J. S. Holman, the Vice-President of the Company, and P. Murrah, the attorney of the Company, a short time before the sale sought his consent to such sale for such purpose; and witness refused, because the assets and bonds about to be received as a loan from the State were sufficient to pay off the indebtedness, R. 212, 213. He says H. S. Fulkerson, the purchaser of the road, was an agent on third September, 1861, R. 214. That the Company recognized his stock and debts against the old Company in the new Company, R. 215, 216. By James Turner's testimony the Company got Turner and McKay to hold up their executions against the road while the Company, through its attorney, P. Murrah, controlled other executions, and sold out the road third September, 1861, R. 218, 219. At the sale, H. S. Fulkerson, the purchaser, stated to the bidders "that none of the *bona fide* creditors or stockholders were cut off by the sale;" and the claims held by Turner were all recognized by the new Company, R. 219.

J. M. Waskom proves that at the sale H. S. Fulkerson publicly stated "that he bought for the benefit of all *bona fide* creditors and stockholders;" that Fields, of New Orleans, furnished the money to purchase the road, R. 229; that at the first meeting of the new board after the sale a resolution was adopted to recognize stockholders and creditors of the sold out Company as soon as possible, R. 230. See resolutions B III of sixth September, 1861, pp. 2 to 8—15 to 19 inclusive.

W. T. Scott, a director in the Company, says: "I don't think I was pressnt at a sale of the Southern P. R. R. that took place on third September, 1861, at Marshall, Texas; I may have been in town on that day, but do not remember whether I was or not; J. S. Holman was the Vice-President of the road at the time of the sale, and I was a director; H. S. Fulkerson was the purchaser, and Mr. Fulkerson was an agent of the road at the time, but in what capacity I do not know, or by what authority; he was also a commisson merchant in New Orleans, and was very active in the interest of the road; was not at Marshall very often, but was here on day of sale; I do not know that he has ever been in Marshall on any other occasion than that one, nor can I say positively that he was a commission merchant at the time referred to; I understood that the sale referred to was by agreement of the parties interested; whether the agreement was verbal or in writing, I do not know; that the sale and purchase should be for the benefit of all *bona fide* creditors and stockholders of the Company; and my understanding was that the purchase money was obtained from Mr. Joseph Fields, of New Orleans, Louisiana; Mr. Fields was a stockholder in the Company at that time; my understanding is that Mr. Fields furnished the money with the expressed condition that the sale should be for the benefit of the *bona fide* stockholders and creditors; I don't remember that the money was returned to Mr. Fields, though it may have been; I can't say it was not; I do not remember that the money referred to was ever refunded to Mr. Fields out of the U. S. bonds obtained from the State as a loan."

E. A. Blanche, chief engineer of the Company, and a witness for Defendants, says: "Jeptha Fowlks was a stockholder in the road, and owned one hundred thousand shares of stock. He was a member of the board of directors in 1861. In the month of August, 1861, I was at the house of Jeptha Fowlks, in Memphis, with Jeptha Fowlks, R. V. Richardson, James S. Holman, James H. Rogers and W. H. Smith, of the firm of DeGraff & Smith, and Col. Maclemore, who lived in Tennessee, when the general financial condition of the Southern Pacific R. R. Co. was discussed, and the conclusion arrived at by the officers and agents

of the road present was that a sale of the road was its only salvation. It was then and there agreed that the sale should take place on the third day of September, 1861, that being the next regular sale day in Harrison county, Texas. It was further agreed and understood that in case the sale should take place that no one who held a *bona fide* debt against the Southern Pacific R. R. Co., or any *bona fide* stockholder who had complied with the policy which had been adopted in Louisville in 1859 and 1860, should be excluded as creditor or stockholder in a Company that might be formed after the sale. Dr. Jeptha Fowlks, financial agent, at that meeting, promised to have $20,000 in the city of Marshall previous to the sale day, for the purchase of the road.

The day after this conference in Memphis I left the city in company with Major Holman and Gen. Rogers, Holman intending to return to Marshall with me. On the train between Memphis and Jackson, Mississippi, Holman and myself got into a conversation about the probability of Fowlks getting this money, and Holman became convinced before he got to Jackson that it was an exceedingly doubtful matter whether Fowlks would raise the money or not. He therefore concluded to go to New Orleans and try to raise the money himself. He accordingly went. I came directly to Marshall. A few days before the sale day here, Major Holman came to Marshall in company with H. S. Fulkerson.

The sale took place because it couldn't be prevented for any considerable length of time; the Company was largely in debt, and had no means of paying them to an extent sufficient to prevent a sale soon; the stockholders would not respond to the calls made for the assessment on their stock, and the earnings of the road were not sufficient to pay the expenses of its operation; it was also considered that a very large amount of stock was held in States not embraced in what was then known as the Confederate States and under the policy of the Confederate government; a schedule of all debts and liabilities due from individuals or corporations to persons living in the United States had to be rendered to a receiver; the Company did not desire to go through this operation; most of these stockholders in the Northern States had never complied with the policy adopted at Louisville, Kentucky,

in 1859 and 1860, and it was questionable whether they were stockholders at all or not; the sale of the road on the third of September, 1861, was made as a protection to the stockholders and creditors of the Company, both North and South, and to keep the road in existence and out of the hands of the Confederate States Receiver; there was a Receiver here clamoring for a schedule of the stock belonging to and debts due by the Company to persons living in the States other than the Confederate. The Southern Pacific R. R. Co. apprehended that the rendering to the Receiver this schedule would result in a confiscation by the Confederate States of the stock and debts so due to citizens of the other States in the Union other than the Confederate States."

By the testimony of H. S. Fulkerson, who was agent and purchaser of the road third of September, 1861, it is shown that he went at the instance of J. S. Holman, Vice-President, to buy the road—borrowed the money of Joseph Fields, of New Orleans, to pay for it, upon condition that he would buy it for the creditors and stockholders and the Company refund the money; that the officers in the old Company became officers in the new Company, that the purchase money was, by the Company, through witness as agent of the Company, refunded to Fields. See R. 709 to 743. Interrogatories and answers, 10, 11, 12, 13, 14, 15, 16, 17, 20, 22. Also cases 12, 14, 15, 16, 17, 20. R. 748 to 751.

Fulkerson's deed to his associates, dated seventh September 1861, R. 85, 86, shows that no *bona fide* creditor or stockholder of the Company was to be cut off, and that he bought by agreement with the officers of the old Company for the benefit of the Co.; that the officers of the old Company were to be the officers of the new Company; that the purchase money was to be refunded by the new Company. V. K. Stevenson proves that there were Northern creditors and stockholders at the date of sale. R. 568, 569; also, see 489; that the road was solvent, R. 583; that authority was given by him to J. S. Holman to draw for $10,000, or for enough money to pay off the judgments under which the road was sold, R. 583, 563, 564. This money was not drawn, as it

was by agreement between Holman and the other officers that the road should be sold to cut off the Confederate States Receiver.

It seems clear that the officers acted by agreement in the sale of the road; they did not desire to further postpone or delay the sale, but desired to sell then and there, under the executions pending against it, and therefore did not use the money provided by the President. See deed of Sheriff to Fulkerson, exhibit A, R. 83, 84, and deed of Fulkerson to his associates, and a resolution on books (not printed in record) passed immediately after the organization of the Company, on the sixth of September, 1861. Book III, p. 2 to 8.

Holman informed W. H. Smith that the road must be sold in August, 1861, R. 482, middle of page. This sale was intended to cut off Northern creditors and stockholders. Andrew DeGraff was then one, and Stevenson and Smith since became residents of the North, and R. W. Hyman was then and is now a creditor of the Company, and resided then and now in the State of New York.

J. S. Holman, after the sale in 1861, told Smith that DeGraff should be excluded, because his son had entered the Northern army, R. 482, 483. But said Smith should be protected and that Stevenson should be paid his claims, R. 489, 499, 500; that all Northern stock and bogus stock was cut off, but honest debts should be paid. A circular was issued by the Company October 1, 1861, which shows fully the intent and purpose of the new Company with reference to Northern stockholders and creditors, see exhibit "M," R. 596, also 566. For this reason alone the Courts would set aside this sale for the benefit of all creditors and stockholders then resident North, and once set aside, all whose claims were not barred would come in and share in the proceeds of a sale.

A strong badge of fraud in this sale, if it had not been by the Company to the Company, was the inadequacy of the price. The road and franchise and all the property sold for $7,500, R. 83, 84. The road and property sold with the franchise was worth from one to two million dollars third September, 1861. See testimony of W. H. Smith, R. 500, 511, 517. See exhibit Q, a statement of its value soon after the sale, R. 623. The testi-

mony of Stevenson, R. 568, says it was worth one and a half millions, with debts of $200,000 against it. E. A. Blanche, chief engineer, says the then twenty-five miles completed had cost $22,-500 per mile, without including rolling-stock, lands or franchise, R. 527. A. C. Martin, engineer and inspector of the State, estimates its worth, without the lease, two million dollars. J. M. Waskom, director and President of the road for years, says the cost was over $15,000 per mile for the twenty-five miles completed, and the franchise was worth $5000 per mile. This would make the franchise alone across Texas over six hundred miles, worth $3,000,000. In the report of the Company, made, August 31, 1861, for the year ending June 1, 1861, to the State, under oath, it shows assets over liabilities of about one million dollars, besides 256,000 acres of land, estimated at one dollar per acre, R. 99, 100, 101. But the Company declares to the world, twenty-seven days after the sale, on to-wit: First of October, 1861, that the road was worth one million dollars, R. 596, exhibit M.

By the terms of the sale, the deed of Fulkerson to his associates, the resolutions of the Company, the testimony of Fulkerson, W. T. Scott, E. A. Blanche, J. M. Waskom, A. T. Smith, C. E. Hynson and James Turner, all show that the new Company recognized the debts of the old Company June 1, 1862—thus showing that the Company sold and bought for the Company. See particularly exhibit K, R. 307, deed to R. B. Hall, recognizing several judgments rendered before the sale of 1861, and the road is sold under them in part.

But it is charged that by this sale of third September, 1861, at least one execution, that in favor of Sanders against the Company, was levied on the road, franchise and property, ninth of August, 1860, sixteen days before the deeds of mortgage were executed, on the twenty-fifth of August, 1860, and before their record on March 1, 1861, and by virtue of this execution lien and sale was prior to the mortgages, and cut them off under the said sale. The road was sold under four judgments and executions, as follows:

J. M. Sanders, judgment sixth April, 1859, $300.09, cost $74,00—$374.09. Execution levied ninth August, 1860.

Henry Wickland, judgment 26th of September, 1860, $3500 and costs. Execution issued the 11th of July, 1861, and levied the same day.

Amelia Swanson, judgment 27th of October, 1860, $2480.50 and costs. Execution issued 22nd of November, 1860, levied January 3d, 1861.

J. B. Williamson, judgment 23d of October, 1860, $1000 and costs. Execution stayed six months. Execution issued 23rd of November, 1860; levied January 3rd, 1861. R. 319 to 332.

The first execution for $374.09 was credited before 3rd of September by $277 paid as clerk's costs by the company, leaving a balance due on the 3rd of September, 1861, before costs of sale were added, of $97.09, due by company to satisfy this execution. After the sale of the road for $7500, the sum of $105.59 is entered on execution in full satisfaction of the same.

J. S. Holman, vice-president of the company, before the sale on the third of September, 1861, laid out and expended more than enough of money to pay off this first execution in the purchase of the clerk's costs on these four judgments, to-wit: clerk's costs, J. M. Saunders' judgment, $13.75; clerk's costs, Henry Wickland's judgment, $61.07; clerk's costs, J. B. Williamson's judgment, $9.15; clerk's costs, Amelia Swanson's judgment, $18.85; total amount paid out September 3rd, 1861, $102.82; enough to have paid off the balance of $97.09, and have $5.73 left.

But on the same day, September 3rd, 1861, J. S. Holman and A. Pope—the Fulkerson bid of $7500 being insufficient to pay all the judgments and costs—paid out on the J. B. Williamson execution, $190.83. R., 289. Assuming that Holman and Pope paid equal amounts, then Holman paid one half of $190.83, or $95.41, which, added to the $102.82, makes $198.23 paid out by Holman that day on behalf of the company, for he was a director and vice-president; and whether he paid it as individual or officer, the effect is the same in law. He did it for and on behalf of the company, and the conclu-

sion is apparent that if it had not been by design and prearrangement not to settle these claims, so as to prevent a sale, and the vesting of these mortgage liens, this small execution would have been paid off. But equity considers done what in equity and good conscience ought to have been done. And having the money in hand, Holman should have paid off this execution.

From all the evidence on this sale, it seems the conclusion is irresistible that the officers of the company agreed in July or August to allow the road to be sold September 3rd, 1861, under the four executions named, for the following reasons and objects:

1st. To avoid returning a schedule of stock and debts due persons residing in the north to the Receiver of the Confederate States, and submitting to the sequestration or confiscation and sale of this interest, which was very large.

2nd. To actually cut off by the sale such stock and debts owned by persons north as the company desired.

3rd. To disencumber the company of such debts and stock at home as they should decide were not *bona fide*, and thus prevent such claims from being pressed against the company.

4th. To reorganize the company—get rid of such officers and agents as those agreeing to it wished—and making Holman president.

It is also equally clear from the testimony of the witnesses named, and the records showing the purchase of the costs by Holman, that the company actually controlled by its attorney, P. Murrah, all of the executions under which the road was sold on the 3rd of September, 1861. Add to this the declarations at the sale by Fulkerson, the terms of his deed to his associates, their resolutions subsequent, and the recognition of the old debts in the new company, the agreement to allow the road sold, the officers of the old company becoming officers of the new, the securing of Fulkerson to buy the road by Holman, borrowing the money of Joseph Fields, a stockholder, on certain conditions, to purchase the road, and the refunding it

to him by the company, the circular cutting off northern stockholders, the reports of the assets, the authority to draw for money to pay off the judgments under which the road was sold, the value of the road, property and franchise, the great inadequacy of the price, and the declarations and actions of the officers of the new company immediately after sale, all show unmistakably that the sale was made by a previous understanding and arrangement among the officers and directors present; and that the effect was, that the company sold the road and bought it in, and there was in fact no change of title, and the sale could not be allowed to stand for a moment as valid against any *bona fide* debt or stock, and that the sale did not affect the mortgage liens. For authorities refer to fraudulent sales P. D., vol. 1, art. 3876.

The trustees, the directors agreed to the sale of 3rd September, 1861, before hand, controlled the executions on the day of sale, procured a purchaser, and refunded the purchase money—directors of sold out company became directors of the new company—the title did not pass to the new company—the identity of the corporation remained unchanged. See 13 Wallace, 525; May vs. LeClaire, 11 Wallace, 236; 9 Bush, (Ky.) 468, *et seq.*, with full authorities; 7 Wallace, 299, 303; 6 Wallace, 752; 7 Wallace, Cocks vs. Izard, 559; Galveston R. vs. Cowdry, 11 Wallace, 475. "The rule that a trustee shall not deal with the subject of the trust for his own benefit is said to be absolute and universal. It is subject to no qualifications and to no exceptions." Merriman vs. Russell, 36 T. 285, with authorities cited.

In Davone vs. Fanning, 2 Johnson, Chancery R. 252, it is said that a trustee buying for a fair price at a *bona fide* sale, through a third person, at executor's sale, that still upon application the sale will be set aside.

All corporate acts of directors and agents are but a succession of trusts. See Sturgis vs. Knapp, 31 Vt., 1. In the case of Jackson vs. Ludeling, 21 Wallace, 616 *et seq.*, it is said the managers and officers of a company where capital is contribu-

ted by shares, are in a legitimate sense the trustees for the stockholders and creditors, though not technically so. They have no right to contrive to purchase the property at a sacrifice for their own use, they cannot seek their own profit at the expense of the company, bondholders or stockholders. If the campany is embarrassed it is their duty to make the property bring the highest price. See Pannock vs. Coe, 23 How, 117; 26 T., 57 Mackay vs. Martin. Gross inadequacy of price, with other slight evidences of fraud, will be sufficient to set aside a sale. See Jackson vs. Ludeling, 21 Wallace, 116. In that case the sale of the Monroe, Vicksburg & Shreveport R. R. was made for fifty thousand dollars, estimated to be worth two million dollars, and was set aside for fraud. In the case at bar, the sale was for $7500, and the property estimated to be worth from one to two millions. Johnson vs. Shaw, 23 T., 590; McFadden vs. Venson, 21 T., 57; Allen vs. Stephanes, 18 T., 658.

It is no defense that the company directors or trustees approve and participate in the act; nor is it any defense that the company was insolvent at the date of the sale. Covington & Lexington R. R. Co. vs. Bonler's heirs, etc.; 9 Bush (Ky.) 470, *et seq.*, with full authorities cited.

The change made in the company by reason of the sale, and the reorganization with part of the officers of the sold out company becoming officers in the new company, did not change title or alter its liability. Galveston R. vs. Cowdry, 11 Wallace, 459.

The sale to cut off creditors and stockholders residing out of the then Confederate States, and in the Northern States, and to avoid their interest being sequestrated and confiscated by the Confederate States, was unlawful and fraudulent, and will visiate the sale. Knox vs. Lee, 12 Wall., 457; Texas vs. White, 7 Wall., 700; Dean vs. Nelson, 10 Wall., 158; State vs. Stoll, 17 Wall., 425; Fritz vs. Stover, 22 Wall., 198. The sale under judgments and executions subsequent do not disturb the prior liens. Galveston R. vs. Cowdry, 11 Wallace, 459, *et seq.*

Thus the evidence and the law applicable to it, establish that this sale was not a *bona fide* change of title, it was made under the direction and control of the company, was purchased by and for the company, and with the funds of the company, and therefore no real change of title passed. But the ostensible change was used to cut off all creditors and stockholders whom the officers of the new company desired. And among them are those who have joined in this suit. We conclude that this sale was fraudulent and void, and must be set aside; that it was made subsequent to the execution and recording of the deeds of mortgage, and is subordinate to them. The sale being fraudulent, it does not matter that one of the executions was levied prior to the execution of the mortgages. The fact that funds were in the hands of the company 3rd of September, 1861, to pay off the prior encumbrance to the mortgages, is sufficient; equity will mould the remedy and consider the payment as having been made. It will be remembered that of the four judgments under which the road was sold, only one of $97.09 was prior, all the others were rendered and levied subsequently. And the sale under all instead of under the only one which was prior, is a strong circumstance to show that the officers desired to cut off and destroy this mortgage, but it cannot avail. The principles of equity step in and prevent the wrong. The mixing of prior and subsequent claims was a mere sham to swell the apparent amount against the company, and was *colorable* in itself.

The effect of annulling this sale establishes the priority of the deeds of mortgage with all the securities mentioned therein, and opens the door to all claims not barred, and all stock then held against said company. The claim of the three ten thousand dollar notes and the account are valid claims, and said sale is no bar to them. And all subsequent purchases of said road took with full notice of said mortgages and the liens created thereby against the property of the road; and that sale being a fraud, all subsequent purchasers took notice of it, and could not acquire a good title, as against these claims. It

is submitted that this sale being a fraud, the title did not and could not pass by the subsequent pretended sales. There was, in fact, no change of title except it is subject to these debts.

But it is claimed that subsequent sales did cut off all claims held against the company, not merely the lien to secure the bonds, but all others. As to the claims not covered by the mortgages, if it should be determined that there are any, it will be insisted, no doubt, that they at least are reached by the sales after that of 3rd September, 1861.

It is not deemed really necessary to adduce the evidence to show that all subsequent sales were fraudulent, or made without warrant of law, but as it is within our power to do so, and thus remove all doubts that might be raised on such a question, and for this purpose only we will consider the subsequent sales in the order of time they occurred, and endeavor to show that they cannot be upheld by a court of chancery.

We will first notice the sale of the lease of the Vicksburg, Shreveport & Texas R. R. to the S. P. R. R. Co., which occured 4th of April, 1868. It is contended by defendants that this lease being property, lying in Louisiana and not under the charter of the S. P. R. R. Co., that it was not covered by the deeds of mortgages—that the lease was made after the execution of the deeds of mortgages, and not embraced in them. But by the terms of the mortgage it will be seen that the property then owned or afterwards acquired, or in other words, all appurtenances of the road were included; and the only question in regard to this lease is, was it an appurtenent to the road, or is it property belonging to the road—do the equipments and rolling stock on this constitute or form any part of the S. P. R. R.? If they do, then the property is embraced in the mortgages and the lease had seventeen years to run from the 4th of April, 1868, and belonging to the S. P. R. R. Co., and so considering it, we will inquire into the sale of the lease and property 4th of April, 1868.

The sheriff of Caddo parish, La., conveyed by deed to B. M. Johnson, lease and property belonging to the S. P. R. R.

Co., sold 4th of April, 1868 (See exhibit "G," R. 297, 298). A resolution was passed by the company 18th of December, 1867, authorizing the vice-president of the company and the attorney of the company, to confess judgment on all approved claims against the company in favor of A. M. Burnham & S. E. Waskom in the district court of Caddo parish, La., upon certain conditions. R. 865. The directors and stockholders holding claims immediately transferred their claims to these parties, and judgments were obtained, attachments levied on the property and the sale effected. J. M. Hall, a director, was one of the attorneys of the company. W. T. Scott, R. B. Hall, A. Pope and J. M. Waskom were directors, and agreed to this sale. An agreement was entered into by the directors of the company for their mutual benefit to sell the lease and property, and to sell the S. P. R. R. in Texas also. See testimony of Jas. Turner, R. 220, 221. Johnson was mutually agreed upon to bid for both parties for the ~~company~~ property. The sale was forbidden and the purchaser bought with notice. R. 222. See McKay's testimony, R. 709. After the sale, the said directors and interested parties in pursuance of previous agreement, on to-wit: 9th of May, 1868, organized themselves into a company. See exhibit "F," R. 293, *et seq.* See testimony of J. M. Waskom, vice-president, R. 231, 232, 233. Also testimony of W. T. Scott, as to agreement to sell, R. 239. E. A. Blanche's testimony, R. 261 to 266, 267, 273. And Martin Tally's testimony, answer to 4th, 5th and 6th interrogatories. R. 684-5-6. Also see testimony of Wm. Bradfield's answer to 5th, 6th, 7th and 8th interrogatories. R. 456-7. Bradfield refused to join in the plan to sue and sell out the road, and was thereafter not permitted to know the deliberations of the officers interested in the sale. Also see answer to interrogatories 23 and 24, R. 461, as to earnings of the road; answers to interrogatories 16 and 29, R. 459, 463, and answers to cross interrogatories 15, 16, 18, R. 471-2. See testimony of O. J. Taylor's answer to interrogatories 1, 2, 3, 4 and 5, R. 447-8; and see answers to 2, 4, and 5, cross interrogatories.

See testimony of Samuel Wimbish, answers to interrogatories 2, 3, 4 and 5, R. 768-9; and answer to direct interrogatory 6 of J. N. Coleman, R. 702, and cross interrogatory 4, R. 706. See testimony of S. E. Waskom as to claims transferred to him by J. M. Waskom, his father and vice-president, R. 783-5-7, as to agreement to sell lease, 793; amount received, R. 794, 796; and mortgage of R. B. Hall held no lien on lease, R. 793. See R. 764-5-6.

By these witnesses and the books, it is apparent that a plan was entered into by the majority of the directors, a few of the stockholders, and one of the attorneys of the road, to procure judgments and attach the rolling stock and other property of the S. P. R. R., together with the lease on the V. S. & T. R. R., and sell the same and become the owners, and thereby cut off all stockholders and other creditors. This plan did not include R. B. Hall and the Louisville directors, stockholders and creditors represented by Hall at the date of plan, about the 18th of December, 1867; but afterwards, upon it being made to their interest, they became parties to the plan, and then and there, about the 3rd or 4th of April, 1868, just prior to said sale, the agreement was entered into by Hall and those he represented. The effect of this agreement to sell, and under which the sale was made, was directly for the benefit and profit of these officers, directers, stockholders and agents in the company, and the entire plan was intended to exclude all others except themselves, and become the sole owners of the property. The fact that a third person bought cannot avail; he bought at the request of the parties at interest, and for their benefit, and did not pay a farthing of the purchase money, and the deed was made to the real purchasers. This sale was fraudulent and did not pass the title to the parties buying—the title remained in the S. P. R. R. Co., and those acting under such sale will not be allowed to reap a profit by the act; they were the trustees of the company and bought for it. Galveston R. vs. Cowdry, 11 Wall. 459; Jackson vs. Ludeling, 21 Wall. 616; Pannock vs. Coe, 23 How 117; 9 Bush (Ky.) 468, with full authorities cited.

There was no necessity to sell the lease and property—the S. P. R. R. Co. was making money—$500 per day, and was solvent, in fact had perfected arrangements to pay off the debt of Howard & Wimbish, the only one that was pressing. See the testimony of Bradfield and Wimbish.

The directors and attorney of the road sought claims against the road, and induced the holders to bring suit to embarrass the Company and force a sale. See testimony of O. J. Taylor, Bradfield, W. T. Scott, Martin Talley, J. N. Coleman, Blanche, and resolutions of eighteenth December, 1867. And particularly agreement of association, exhibit F, R. 292, showing assets and what was sold, including lease for seventeen years. The lease interest, the rolling stock and other property was worth from $250,000 to one million dollars. See the testimony of Bradfield, Martin and J. N. Coleman, R. 292.

The road was so run from the latter part of 1867 till the sale of April 4, 1868, as to produce a necessity for the sale, and the directors and officers largely participated in this scheme; and having brought about the necessity by refusing to put the road in a condition to make money, or to apply the earnings to the payment of the debts, and instead of warding off suits, proceeded to facilitate by acts and advice the bringing of suits, the recovering of judgments and sale of the lease and property. Then those who had not entered into this plan to sell the property and become owners, did agree to it and participated in the fraud of third and fourth of April, 1868. Notice was given at the sale of the mortgage lien of R. B. Hall and others on the lease, which was false, as it was no lien and had not been recorded in Louisiana. This sale and purchase failed to pass title—it is fraudulent and void.

As to the bonds secured by the deeds of mortgage, full notice was given, as the purchasers were directors and officers of the Company, and as to the claims for money which might be held to be covered by the mortgages, full notice was given at the sale, and the purchasers took with notice of these claims, and therefore the said sale cannot be plead successfully as being a bar to their recovery; nor can the purchasers at said sale be innocent pur-

chasers; they did not pay cash and had full notice, and being trustees bought for the benefit of the company.

We will next inquire into the sale of the S. P. R. R. and its property under sundry executions, made 5th day of May, 1868, at Marshall, Texas. The facts and circumstances connected with the sale of the lease and property on the 4th of April, 1868, at Shreveport, La., formed a part of the plan for the sale of the 5th of May, 1868, and will tend to elucidate and explain to some extent the last sale.

The sale of the 5th of May, 1868, was fraudulent and void as to creditors and stockholders, and was wholly unauthorized by law.

Attention is directed to the deed of the sheriff of Harrison county, S. R. Perry, to R. B. Hall, 5th of May, 1868, see exhibits "D" and "K," R. 87, 307, the consideration $2150. And the deed from R. B. Hall to his associates, 5th of May, 1868, exhibit "L," with its agreement constituting part of it, exhibit "F," R. 313, 292. This deed, by its terms, shows that it was but the part of a plan previously agreed upon in Shreveport, La., 4th of April, 1868, to sell the road and property, and the parties at interest and in the *ring* to become the owners to the exclusion of all other stockholders and creditors. The articles of association made part of Hall's deed to his associates, although dated 9th of May, were, in fact, made and agreed to about the 4th of April, 1868. See declaration in the deed, also testimony of James Turner, R. 222, and they formed but one conveyance, R. 223, at bottom. R. B. Hall was a director and made president in the organization under purchase of 4th of April, 1868. The identical directors made under the sale and organization 4th of April, 1868, were made under organization of company after the 5th of May, 1868; and the same parties allowed stock under the one were under the other, and to the same extent. The sale ought to be set aside because—

1st. Bidders were prevented from a fair competition in bidding by improper, untruthful and fraudulent announcements

being made at the sale by the parties connected with the road, calculated to, and which did drive off bidders.

2nd. The price bid and paid was grossly inadequate, and when considered in connection with other gross manipulations and fraudulent acts of the officers of the company and those acting with them, show the sale to be a fraud.

3rd. R. B. Hall was a director on the day of sale, and just a few minutes prior to the sale, he bought of John Burke, then and there the attorney for the company, and also the attorney for the estate of P. Murrah, deceased, a judgment, dated the 22nd of September, 1866, for $4973.81, with eight per cent. and cost, at twenty-five per cent. on the dollar, and this was one of the executions under which the road was then about to be sold, and it was sold under it and others.

4th. R. B. Hall, on the day of sale, was president of the company under purchase of the 4th of April, 1868, and director, and his purchase was for the company.

5th. The sale and purchase of the 5th of May, 1868, was part of a scheme, planned and agreed to by the directors, officers and judgment creditors at Shreveport, La., about the 4th of April, 1868, to bring about a sale, depress the value of the road and property by swelling the indebtedness and making such false and untruthful announcements as to deter others from bidding, and by such means become the purchasers themselves for their own benefit at an unfair value.

J. W. Pope shows that he was prevented from bidding by James Turner whom he believed to be the attorney of the company, and but for this he would have bid ten thousand dollars; that R. B. Hall made several announcements at the sale, that the State held first liens for large amount—he held mortgage liens for large sums, that the purchaser would get no title, and that Hall bid $2150, and the road was knocked off to him. That S. R. Perry gave notice that the bid must be paid in cash. Also that John Burke sold claims of P. Murrah's estate to R. B. Hall for 25 or 30 per cent. on the dollar, just prior to the sale, and makes exhibit "M" part of his testimony

showing the execution he referred to, R. 245-6-7 and 314-5. James Turner corroborates this statement. He shows John Burke was the attorney of the company at the date of sale of judgment to R. B. Hall, R. 225; that several notices were given at the sale, and that he made a statement to Pope that stopped his bidding, R. 224-5; that R. B. Hall was at that date a director, R. 223, middle of page; that R. B. Hall was allowed the amount of judgment against Murrah's estate after sale in stock, R. 223; that the officers elected in organization of the company after sale of May 5th, 1868, were the same elected in the organization under sale of April 4th, 1868, R. 223-4; that the stock was doubled after the sales.

W. T. Scott shows R. B. Hall bought judgment of Burke before sale for less than face value, and received pay for it after sale in stock in the Company, R. 240, at top of page; that all creditors and owners in the purchase received two dollars of stock for one after the sales. E. A. Blanche shows that no other stock or debts were admitted after sale of May 5th, 1868, R. 263-4; also shows the value of the road, R. 264.

H. McKay testifies to the various notices given at the sale by J. M. Hall, attorney and director, by R. B. Hall, a director, and S. R. Perry, the sheriff making the sale, who was a director at the time, R. 710, 711, 712.

Martin Tally proves that those interested in and who had agreed upon the plan to become the owners, had formed a ring and selected such members of a few directors and officers as were interested in carrying out such plan. R. 684-5.

Wm. Bradfield proves that the judgment creditors who sold the road and bought it under the sale of April 4, 1868, took an equal interest under the sale of May 5, 1868, R. 462; that after sale of October 6th, 1868, the stock was doubled, R. 459; that the value of the road sold was two million dollars, and that it was making more than expenses, was taking in $500 per day up to sale of May 5, 1868. R. 460.

J. N. Coleman proves that several notices were given at the sale; that John Burke, attorney of P. Murrah's estate, sold

judgment to R. B. Hall for 25 cents on the dollar just before sale. See answers to interrogatories M. 13, R. 702-3.

J. M. Waskom proves value of road May 5, 1868, $15,000 per mile, and for franchise $5000 per mile, besides rolling stock and other property. R. 234.

O. J. Taylor shows that the agreement was made prior to sale of April 4, 1868, to double the stock, and in less than a year it was done. See his answer to 5th cross interrogatory, R. 452.

A. C. Martin testified that the road and franchise was worth two million dollars May 5th, 1868. R. 249, 250.

The evidence referred to, much of it record evidence furnished by the defendants, and showing the acts of the officers and directors of the company, leave no doubt in the mind that the sale of May 5th, 1868, was one of the most wretched frauds ever perpetrated under the forms of law.

If the directors, president, vice-president, a few stockholders, agents and creditors can form a ring, deliberately draw up a plan to produce the necessity for a sale of the road and property, confided to their care as trustees, use the forms of law the better to shield from scrutiny their scheme; at the sale announce that the purchaser will get no title; that the United States had large claims, amounts unknown, against the property, which was false; that sundry large claims were against it that must be paid by the purchaser, thus swell the incumbrances upon the property to depress the price; then with a willing sheriff, also a director, to require the bids paid at once in cash, and by this means deprive judgment creditors from bidding, and driving off and deterring all bidders but themselves, these acts having the effect to actually prevent bidding, and the sale upheld, then the courts of the country become a snare, a mockery, and lend themselves to aid those who so desire, to plunder those who trust them.

Can it be that a president, a director, can on the day of sale, but a few minutes before it, buy of the attorney of the company a judgment against the road, and the executions upon

such judgment levied upon the road and then to be sold under it, for 25 cents on the dollar against the company he represents, and he become the purchaser of property worth two million dollars for $2150, be allowed to retain such gain? Will a court of chancery permit the trustees of a corporation to sell the property entrusted to them for their own benefit? Every principle of equity, jurisprudence and every decision of the courts of law and chancery of which we have any knowledge, alike condemn and denounce such actions, and when brought before the enlightened tribunals of this country they will hasten to afford relief to those who have thus been plundered. For authorities see 9 Bush (Ky.), 468, with authorities cited; 11 Wall., 459; 21 Wall., 616; 23 How., 117; 7 Wall., 299; 6 Wall., 752; 7 Wall., 303; 7 Wall., 559; 39 Texas, 285; 2 Johnson's Chancery, 252; P. D., article 3876, item 5.

These authorities we regard as conclusive that this sale cannot be maintained because of the fraudulent conduct of the trustees of the company in bringing about the sale, buying at the sale for their own profit, and cutting off all other creditors and stockholders who had an interest in the road and property,

But if their existed any doubt about the frauds perpetrated at this sale, and their sufficiency to vitiate and annul it, there certainly can be no doubt that there was no authority of law to make the sale.

By the act of the legislature of December 19, 1857, P. D., vol. 1, art. 4912, 4914, authority was given to sell under execution for a debt a railroad franchise and chartered rights as an "entire thing." This act was repealed by the adoption of the constitution of April 2nd, 1866. See P. D., vol. 1, p. 943, art. 7, sec. 36. This act being expressly repealed, there was no new authority until the adoption of the constitution of March 30, 1870.

In the case of Good vs. Sherman, 37 T., 661, the question of whether this act was repealed was not raised, and the court

passed upon the subject without reference to the repeal. See Scoggin vs. Perry, 32 T., 27; see P. D., D. vol. 3, under head of railroads, sec. 20839, *et seq.*, for authorities; see P. D., vol. 2, p. 1130, sec. 33, notes. This constitution of 1866, except the several acts mentioned by name as repealed, and held void by military proclamation, and the adoption of the constitution of 1870, are held to be in full force and effect. See P. D., D vol. 3, sec. 20, 857, with full authorities cited, and Davis vs. Gray, 16 Wall., 225, 232. Also for the laws that are repealed and those that are in force, see 36 T. R. Railroad Co. vs. Commissioner, 390-1. 401, 417, 418 and 419, middle of page. These provisions must stand upon the general principles of the law of nations, Id., 420, 424-5.

And the same article of the constitution of 1866 repealed section 4909, P. D., vol. 1, which required meetings of directors of corporations to be held at the principal office of the company. And this act condoned all acts of the corporations passed prior to this date, contrary to such a provision of law as then existed. Davis vs. Gray, 16 Wall., 223.

From these authorities it follows that the sale of the franchise and property of the S. P. R. R. as an "entire thing," under executions issuing on judgments, on, to-wit: 5th of May, 1868, was utterly void, and passed no title to the purchaser at such sale. So it is submitted that for fraud and collusion among the trustees of the company this sale should be annulled and set aside; and for want of authority of law to make such sale, it was void, and should be so declared. The authorities referred to under the sale of 3rd September, 1861, and 4th of April, 1868, are again referred to as fully sustaining the positions here assumed. And see Rorer on Judicial Sales, p. 174, sec. 475, with full authorities cited.

Up to this sale of 1868, the title has not passed to the parties in possession of the S. P. R. R. and its property, and, therefore, these sales are no bar to the claims in this suit. But it is alleged that the sale made under the mortgages of R. B. Hall and S. E. Waskom on the 6th of October, 1868, was a

valid sale, and is a complete bar to the claims here sued on. There is little doubt that a ralroad and franchise may be sold many times, and if sold under a junior mortgage or deed of trust, it is sold with notice of that which is prior and is subordinate to it. See 11 Wall., 459. Such was the case here. This sale of the 6th of October, 1868, was under a junior mortgage to those of 25th August, 1860; and the purchasers at said sale took with such notice. As to the claims not covered by the mortgages, if it should be held there are any, they are not affected by the sale, because the title did not pass. This sale was made in pursuance of the agreement entered into about the 4th of April, 1868, and practically consummated by the sale and purchase of the road 5th of May, 1868, and was completed by the foreclosure of this mortgage lien 6th of October, 1868, and the purchase of the road and franchise by the then directors and parties at interest under said agreement, and hence the sale and purchase inured to the company.

This view will be sustained by reference to the evidence. See exhibit "E," R. 93, 94, 95—deed by sheriff to R. B. Hall and his associates 6th of October, 1868, for $10,000. The sale was in pursuance of previous agreement. See testimony of James Turner, R. 222, and admissions of record, R. 222-3. About a month afrer the sale of 5th May, 1868, M. J. Hall and James Turner became the attorneys of the company. R. 233. R. B. Hall was then a director and president of the company, and others interested with him in the mortgage were officers in the company. R. B. Hall employed Hall & Turner to file suit against the company to foreclose his mortgage lien, and that of S. E. Waskom, a short time before they became the attorneys of the company. And M. J. Hall, the attorney of R. B. Hall, paid the fee of G. B. Lipscomb, who represented the company as attorney, and who made defense by a general denial after the judgment was rendered. R. pp. 247-8-9.

Also, the testimony of Stedman shows he was employed by the attorney of the company against the company to aid in foreclosing these liens. R. 250-1-2. By evidence of H. McKay

it is shown that at the trial of these cases he endeavored to intervene for creditors, and show that the claims of R. B. Hall and others was tainted with usury, and was otherwise fraudulent. R. 712-3.

For foundation of this claim of one hundred and fifty thousand dollars by Hall and others against the company—see mortgage exhibits A and J—R. 281, 302. By J. M. Waskom, who negotiated the loan, it is shown that $100,000 was actually borrowed 17th of April, 1866, and that the obligations of the company were given for $150,000—$75,000 due in one year, balance in two years, with ten per cent. interest from date, and that this was usurious. R. 229, 230. E. A. Blanche shows the stock was doubled after sale, R. 275, 270 to 273. Wm. Bradfield shows that stock was doubled after sale, property and condition of road and value to be two millions, R. 459, 460. Also see letter of S. E. Waskom to R. B. Hall 5th of October, 1868, giving him control of his claim, R. 307. This gave Hall full control on the day of sale; and see testimony of S. E. Waskom, 795, middle—contradicts his letter of authority, and that stock was doubled after sales.

From the evidence considered in connection with that adduced in regard to the sales of April 4th and May 5th, 1868, of this railroad and property, it can hardly fail to impress the judicial mind with the conclusion that these three sales were, in legal contemplation, but one act, a part and parcel of one scheme, though differing in date and kind of claims, still controlled by the same agreement and fraudulent purpose to disencumber the road and property of claims, but then entering into the plan and becoming the owners themselves by their fraudulent acts and devices. It will be difficult to find a parallel in the history of corporations for a more gross and scandulous plundering of the creditors and stockholders than these three sales. Every step is marked by deceit, unfairness and a betrayal of the most solemn trusts. Trustees to whom creditors and stockholders had confided the most important interest, conceive the idea, actually and deliberately lay the plan for bring-

ing about a sale of the property and becoming the purchasers themselves, and do unblushingly buy, without paying a dollar in cash, at two sales, and by paying less than a thousandth part of the value of the property sold, at the other, and then have the effrontry to stand up in a Court of Chancery and attempt to defend such wretched frauds. Can it be possible to uphold such a sale? See 6 Wall. James vs. R. R. Co. 750 with authorities; 13 Wall. 525; 11 Wall. 236; 9 Bush (Ky). 368, *et seq.*

As a badge of fraud in pursuance of the agreement of April 4, 1868, which seems to have been carried out with more fidelity among the parties in this *ring* than they showed toward the creditors and stockholders, whose interest they had betrayed and destroyed, R. B. Hall and those acting with him had already received full pay for their entire claims against the Co. immediately after the said sale, in the property and lease, shown to be worth from quarter to a million dollars. R. B. Hall and others had received dollar for dollar for their claims before the sale of May 5, 1868. After this sale and before the sale of October 6, 1868, they received two dollars for one. See testimony of J. N. Coleman and book 4, p. 37, resolution September 15, 1868. From this it is clear that R. B. Hall and those interested in said agreement had been paid in full, and the sale was merely to consummate the aforesaid fraudulent plan to become the owners themselves of the entire property. From the fifth of May, 1868, these parties received all the earnings of the road. And when sold March 21, 1872, for three millions of dollars—besides payment of $700,000 floating debt and the State debt—this vast sum was divided among them. The $345,000, the total amount of these claims, as E. A. Blanche shows at sale of April 4, 1868, was first doubled, then they divided among themselves the three million dollars, or each received over nine dollars for one. If this was not the most wretched of frauds, it was at least the most successful of speculations.

We have now reviewed the evidence and law applicable to these three sales of 1868, and find them all tainted with the grossest frauds, for which they should be set aside and annulled.

The rule at execution sales, and especially of personal property, is *coveat emptor*. See Rorer on judicial sales, sec. 459, 460, with authorities cited. This rule obtains in Texas and is the general doctrine. The purchasers at these several sales, if they had been strangers to the record, would have been visited with notice of the rights of the holders of the construction bonds and the securities. This, too, if there had been a *bona fide* sale without fraud. But those who sold and those who bought were fully identified with the Company; they were in each instance directors and officers, and were visited with full and direct notice of all equities against the property. Fraud, however, vitiates all sales, and no title passes, and the purchaser takes nothing. And this was the condition of the Southern Pacific R. R. and its property October 6, 1868.

We are next called upon to consider the sale of the Southern Pacific R. R. and its property to the Texas & Pacific Railway Company, twenty-first day of March, 1872. The defense interposed that this sale is a bar to the claims sued on, and that the purchaser took without notice and is an innocent purchaser, can not surely be insisted on with earnestness. Thomas A. Scott became the President of the Southern Pacific Railroad Company February 14, 1872, and continued as such until it was sold, merged and consolidated with the Texas & Pacific Railway Company, March 21, 1872. R. 804, 806-7. And T. A. Scott was President of the Texas & Pacific Railroad Company at the same time. See deed of conveyance, R. 28-29. By the terms of the several acts authorizing the consolidation of these two roads notice was visited upon the purchasers of liens, encumbrances and liabilities. See 4, 5, 21. And while the suit of the Southern Pacific Railroad Company vs. V. K. Stevenson and W. B. Grubbs was pending, and before judgment, which judgment was rendered March 14, 1872, T. A. Scott was President of both Companies, and the title did not pass until March 21, seven days after judgment, and Scott had been President of the Southern Pacific R. R. Company since February 14, 1872, and therefore had full notice of the suit to cancel these bonds and securities directly and constructingly, and took the property with notice of the incumbrance. And the

Texas & Pacific Railway Company is liable for the entire debts, and is the proper party to sue, having received all the property, and the Southern Pacific Railroad Company being merged and consolidated with it. See case of V. K. Stevenson vs. T. & P. R. R. Co. with facts and authorities cited. R. 442, *et seq.* By this it is shown that the judgment rendered March 14, 1872, was a nulity, and that the T. & P. R. R. Co. are liable for all debts of Southern Pacific Railroad Company, 42 Texas, R. 162. It will be borne in mind that all the legislative acts concerning these roads have been admitted. By these notices were visited upon the purchasers of all equities and claims against the Southern Pacific Railroad Company, for in the merging it did not lose its identity.

It should be remembered that in the four judicial sales referred to of September 3, 1861, April 4, May 5, and October 6, 1868, direct notice is visited upon the purchasers, because the officers and directors to a large extent of the sold out Companies became the officers and directors in the new Companies; these were fully cognizant of the condition of both the old and new Companies, as well as all the equities in favor of creditors and stockholders. But in the last sale it was voluntary under a law that provided protection for the creditors, and actual notice was visited by the fact that the President, who was a director, was President of both Companies, and sold to himself.

We have now briefly reviewed the several sales plead in bar or as defenses by the Defendants to the demands of the Complainant, and find that all are subsequent to the execution and recording of the mortgages and the issuance of the bonds, and therefore must be subordinate to them. That the only exception is in the case of one small execution of less than one hundred dollars which was levied prior to the execution of the bonds and mortgages, and which should have been paid off on September 3, 1861. These sales did not pass the title or change the legal condition of the Southern Pacific Railroad Company under the charter, for they were either made without warrant of law or are so tainted with fraud as to vitiate them. And thus neither the sales of the road and property, under execution or by voluntary act, can

be successfully maintained as a valid defense to the recovery of Complainant on the bonds or on his money demands.

It is insisted, however, by the Defendants, that if Complainant or W. H. Smith ever had valid causes of action against them, that by their long silence they have lost their rights. In other words, their indulgence of Defendants gives Defendants the right to repudiate these otherwise well founded claims. By reference to the testimony of Stevenson and W. H. Smith the reason will be found for the long delay, R. 501-502, 567. But the bonds themselves are not due until January 1, 1883. This delay is caused by the Defendants themselves failing to provide funds in New York to pay off the coupons. Delay in sueing affords no ground of complaint to Defendants. Galveston R. vs. Cowdry, 11 Wall. 459.

Again, it is said that many irregularities were committed by the Company in preparing and negotiating the bonds, and in the holding of meetings of the stockholders and board of directors beyond the limits of Texas; so much so, that provisions of the charter and by-laws were violated, and for which the charter itself might have been annulled. And 24 T. R. State vs. S. P. R. R. Co. 121 to 131 will no doubt be relied on to sustain this view. But it is submitted that the Defendants cannot take advantage of such irregularities, the Company is estopped from taking advantage of its own wrong. No one but the State can bring a suit to annul the charter through its own officers. The Defendants can not interpose such a defense at all, not even against one of its own officers. But even if the law was otherwise and the Company could take advantage of it, the authorities hold that the several acts of the Legislature, passed subsequent to such violations, entirely condone and validate all such irregularities and violations. See P. D. vol. 2, p. 1543, Art 26, May, 1871; Davis vs. Gray, 16 Wall. 223; Railroad Company vs. Commissioners, 36 Texas, 390, 401, 419.

And in reply to the oft repeated charge that the resolutions of August 6, 1860, at which time the election of Stevenson, Holman, Jennings and McDermott, as directors, and E. A. Blanche as chief engineer, and C. B. Stuart assistant engineer of the Company,

resolutions 24-25-26, and by resolution nine Stevenson was appointed President, were passed and adopted out of the State of Texas, R. 853; we say that this was permissible and allowable under the above authorities. That if the charge was true as made, it has been condoned and validated by subsequent legislation for the benefit of the Company.

But if this were not so, still the long acquiesence of the Company in these acts, holding frequent meetings subsequently for fifteen years, without any repudiation of them, the recognition of Stevenson, Holman, Jennings, McDermott, Stuart and Blanche in their respective offices, from that date forward, and the election of J. S. Holman May 19, 1861, as Vice-President, without any new election of him as director, thus clearly recognizing him as having been duly and legally elected August 6, 1860, fully shows that the Company acted *bona fide* and is bound by every resolution passed at that date. R. 859.

It is, however, clear upon proof that the resolutions of August 6, 1860, were passed and adopted at Marshall, Texas. See R. 853, book 2, 105 to 116. This shows that the resolutions were passed at the office in Marshall, Texas, and they are the best evidence. In book 2 at p. 117, the next day, seventh of August, a resolution was passed showing the same officers present, except Fowlks, who had no doubt left after passing resolutions the day before. See E. A. Blanche's testimony, R. 267, showing that such a meeting of the board was held about this date; that DeGraff and Smith were there, and by the books no other director's meeting was held for a month prior to that date. Also testimony of A. T. Smith, R. 279, middle of page. He says, "I know of no report ever having been made by the Executive Committee to the board of directors after August 6, 1860, and I know of no record of that kind." This testimony corroborates that of Blanche and the resolutions themselves. In this connection see resolution of approval by the board record in the Smith case, 78, a part of DeGraff & Smith's contract. This fully shows that the resolutions were passed at Marshall, and the contract approved by the board. The only piece of testimony which seems to contradict this is the testimony ot Stevenson, R. 537; he says: "My im-

pression is that I was present at this meeting, but I may be mistaken; will correct it when I find a certain letter that will assist my recollection, if I find it needs correction. At the same meeting that I was elected President I was also made a director, I think; that is my recollection; I have not had access to the books since 1860." The whole evidence shows that Stevenson was mistaken. He evidently alluded to the meeting held September 1, 1860, when D. C. Wilder was present with the books, and the resolution on the back of the bonds was the one he referred to. For Wilder was present at Marshall August 6, 1860, and he could not be in New York at that date. But Wilder was in New York about September 1, 1861. A. T. Smith acted as temporary Secretary when Wilder was absent; he did not act at this date, and hence Wilder was, as the record shows, present in Marshall on August 6, 1860. But the letter of J. Fowlks, dated New York, August 25, 1860, addressed to V. K. Stevenson, Nashville, Tennessee. "Z," 5, R. 663, leaves no room for doubt on the subject that the resolutions were passed in Texas, at which meeting of the board Stevenson was not present, and that D. C. Wilder was ordered to Memphis, thence to New York to meet Stevenson and others. Compare this with the resolutions themselves and the conclusion is irresistible that they were passed in Marshall. See book 2, p. 118, minutes of meeting August 6 were adopted August 7, these minutes and resolutions offered as genuine by Defendants, R. 866-7-8. See resolutions, book 2, p. 130. Compare resolutions p. 63-4 with these on book 2, p. 81, 85, 89, for date and insertion in the book.

This fact being established, it explains the whole theory of the defense. For it is contended that the resolutions of directors and stockholders of October 5, 1859, were fraudulent and an interpolation in the record, and that those of August 6, 1860, were adopted beyond the State, and thus not being allowable by law; that there was no authority for such action, and that Stevenson being an officer had notice, and the Company can interpose its equities against him. We submit that the proof is irresistible, that the resolutions of August 6, 1860, were passed in Texas, at Marshall, and at this meeting the policy of issuing bonds with

mortgage security, which had been adopted October 5, 1859, was practically carried into operation. The mortgages themselves were submitted and approved by the board, the authority re-enacted and enlarged, giving the power to a committee to modify the mortgages, and the amount and conditions of the issuing were fixed. The contract of DeGraff & Smith, dated June 23, 1860, with a condition to be paid in these bonds was approved by the same board. The several officers then elected, who were all present except Stevenson, accepted and filled these positions afterwards without question. If you could strike out these resolutions you would strike out six officers, four of whom were a majority of the directors, and thus leave the Company without authority to act afterwards. But the Company never questioned the *bona fides* of these resolutions during its existence, it was left to the Texas & Pacific Railway Company fourteen years aftewards to do so. But the law of estoppal says the Company shall not be allowed to interpose such a defense.

If, therefore, the resolutions of the fifth of October were in fact frauds, it does not affect the question here, because the most ample authority is found in the resolutions of the sixth of August, 1860, to execute the mortgages and bonds, and dispose of the latter for the benefit of the Company. And herein is the key to the extraordinary effort of the defense to prove that these resolutions were adopted beyond the State, and by fraud applied to the one, and want of authority for the other, to make a successful defense.

The question is submitted in all seriousness to the judicial mind, after a candid and careful analysis of the grave and high sounding charges of fraud in the answers, coupled with all the proof, to fix upon one single act—*one single fraud committed* by Complainant, Fowlks, or any other person charged. Who committed the fraud? When, where, what was it, and what were the motives that influenced the act? Was it a fraud for Jeptha Fowlks, President of the Company, to sign the two resolutions passed, one by the board of directors and the other by the stockholders? Who had a superior right? Was he not the highest officer in the Company? Was it not entirely proper for the

President to do so? Who had the greatest interest in the Company? It will be seen that by the agreement, which was the foundation of the Company, R. 834-5, that out of a total of 166,037 shares of stock, that Jeptha Fowlks owned 100,000 of them; that at the election of officers, the third October, 1859, 161,037 shares were represented, Fowlks owning 100,000, and that he signed the said agreement October 5, 1859, just as he did the resolutions referred to, R. 835; and R. V. Richardson owned 59,017 shares—that when Fowlks and Richardson acted together they could hold a stockholders' meeting at will, for they owned 159,017 shares out of a total of 166,037. It is proven that the books were correctly kept by A. T. Smith; but if they were not, the Company cannot be heard to put in issue that fact. What could have been the motive that induced Fowlks to have these resolutions recorded and to act upon them if they were not correct and properly passed? Who had the most to lose by the act if it should result in injury to the Company? And why should he spread them upon the minutes of the books of the Company, open to the daily inspection of both directors and stockholders, and the Secretary, D. C. Wilder, if he sought to conceal anything or was attempting fraud? It does not appear that Fowlks ever reaped any benefit from these bonds; on the contrary, he died insolvent about the close of the war and left his family in penury. But what did Stevenson have to do with such acts or such policy? These resolutions were adopted October 5, 1859, and J. Fowlks then elected as President, J. Edgar Thompson followed him, and was elected January 14, 1860, and held the office till August 6, 1860, when Stevenson was elected by the board in Texas, while Stevenson was absent from the State. And the proof shows that the board which elected Stevenson a director and appointed him President, without his co-operation or presence, approved the mortgages and policy of issuing the bonds, and authorized the contract of DeGraff & Smith to be paid in part out of these bonds when issued. The first act of Stevenson in this connection was the twenty-fifth of August, 1860, when he signed the mortgages already approved by the board of directors. Hence

it is too plain for controversy that Stevenson, who was not an officer of the Company until August 6, 1860, had any connection directly or indirectly with Fowlks or the Company in adopting the policy or preparing the documents for execution and consummation. This policy was commenced nearly a year before, and ripened into a reality on the day Stevenson was made President, and that, too, without his presence or influence. Stevenson carried forward this work, and it entered largely into the contracts with George Peabody & Co., M. Belot, DeMiners & Co., and the several transactions by the Company to raise money to push forward the construction of the road. There never was the least semblance of fraud. The Complainant, Vernon K. Stevenson, and W. H. Smith are wholly incapable of committing the acts alleged. And the proof shows that Dr. Jeptha Fowlks was the ruling power, the very soul of the Company for many years, that he exercised the whole power of the board of directors and stockholders from time to time, both in Texas and out of it, without question by the Company; that the confidence reposed in him by the officers of the Company was never questioned until the Southern Pacific Railroad Company ceased to exist and have a name. His character is without a spot—it was unblemished wherever he was known.

It would seem that the Defendants, feeling the weakness and injustice of their defenses so recklessly interposed, have determined to blacken the character of Complainants and those who acted with them in former years, hoping thereby to generate a feeling of disgust and prejudice in the minds of the Court who shall set in judgment upon the trial of this case. The Complainants are fortunate, however, in prosecuting their case before a tribunal possessing such learning, erudition and elevated sense of justice, as to give only such weight to this character of appeal as it justly deserves.

Again, the Defendants charge that if the resolutions of August 6, 1860, gave large powers to the President it was upon condition that he report his action to the board or committee. This was done in the fullest manner, R. 544, 550, 577. Everything was done that was proper to be done to render the acts of the Presi-

dent binding upon the Company and upon those dealing with the Company.

The Defendants interpose the plea of the statute of limitations of two years with an air of satisfaction and pleasure. They speak of the magnificent enterprise of constructing the road and the wickedness of complainant in seeking payment for them. It is submitted that this comes from the Defendants very largely *alloyed* with other considerations, not so reputable to them, indeed, as the beauty of the strong language they use in embellishing their splendid efforts to benefit mankind by their great and unselfish work.

When we consider how much W. H. Smith aand Stevenson lost by their connection with this road, we look with some degree of amazement upon such a plea. On the settlement of Smith with the Company, July 2, 1862, although the Company had encouraged him to go forward with the work, under the positive promise of payment, yet he was forced to lose $244,280, with interest at 8 per cent. since, making now nearly five hundred thousand dollars, R. 485. Stevenson bought and shipped from New Orleans in the spring of 1861 $10,000 of supplies to C. E. Hynson, Superintendent of the road at Marshall, for which he never received a dollar. See Hynson's testimony, R. 214, 217; Stevenson's testimony, R. 562, 577-8. This sum now, with eight per cent., amounts to over $22,000. And the defendants are now seeking to interpose the statute against Stevenson's account of over $54,000 and interest, making, with last item, about $100,000. Having lost by this Company over $500,000 *certainly*, for money and labor expended in constructing this "magnificent enterprise," still the Defendants are using all possible energy to defeat their claims for balance due, founded upon contract and in positive justice. Such defenses afford a fine commentary upon the many false charges against Complainants in the several answers.

If there should remain any doubt in regard to the many earmarks of fraud, and fraud itself, the notice visited upon the vendor and vendee, in each of the four pretended judicial sales of the Southern Pacific Railroad and property, and the total failure to

pass the title at each sale so as to affect *bona fide* creditors and stockholders; to remove such doubt reference is made to the following authorities and those cited in them: Smith's leading cases, vol. 1, p. 33-34-5, Twyne's case:

15 T. R. 196 Edrington vs. Rogers; 15 T. R. 219 Burch vs. Smith; 15 T. R. 42 Wright vs. Linn; 22 T. R. 49 Humphries vs. Freeman; 22 T. R. 672 Weisger vs. Chisolm; 22 T. R. 718 Baldwin vs. Peet; 25 T. R. Sup. 294 Garahy vs. Bailey; 27 T. R. 492 Lewis vs. Castleman; 27 T. R. 479 Belt vs Raguet; 19 T. R. 259 Mills vs. Howeth; 33 T. R. 773 Orme vs. Roberts (in point); 24 T. R. 624 Stradtler vs. Wood; 19 T. R. 272 Mills vs. Walton (in point).

The fraudulent vendee can only bar a recovery by such adverse possession as will give him title. Belt vs. Raguet. 27 Texas 481.

For aid in framing an appropriate decree, see Brownson et al vs. LaCrosse & Milwaukee Railroad Company, 2 Wall, 312; Galveston R. vs. Cowdry, 11 Wall, 459.

We have considered every defense suggested by the answers and have answered each by the proof, not by referring to all the evidence adduced on the subject, for fear of making this brief too voluminous, but sufficiently to satisfy a fair mind, as we think, that the positions assumed are established, and by referring to such authorities as seem to be applicable to the proof, and which leave but little room to doubt their conclusiveness in favor of Complainants.

1. The conclusion is reached, therefore, that the deeds of mortgage and construction bonds were legally executed by V. K. Stevenson, the legal President of the Southern Pacific Railroad Company, and that the mortgages were properly recorded in Harrison County, Texas.

2. That the mortgages having been executed and recorded prior to all liens of executions except one, which one ought to have been paid off with funds in the hands of the Company on the day of sale, are in fact not affected by said sale, or by those subsequently made, in each case the purchaser took with full notice of this lien, and holds subordinate to it.

3. The claim for money paid as endorser is fully established, and the lien should be foreclosed on the 48 bonds, and proceeds thereof applied to payment of the debt, if any balance is left unpaid; that, with the account might be affected by the sales of the road if made *bona fide*. But these sales are fraudulent and cannot be upheld against any *bona fide* creditor or stockholder, and hence the decree should be so framed as to hold the Defendants liable for the balance of the claim for endorsement after the application of the proceeds of the 48 bonds and the account.

4. That the several claims of V. K. Stevenson are valid, and are without the taint of fraud.

5. That all the holders of the same kind of bonds shall be allowed to share in the proceeds of the securities by submitting to the costs to be apportioned by the Court.

6. That the holders of the said bonds will be entitled to recover on their coupons past due, with seven per cent. per annum on each coupon since they fell due. 7 Wall. 104, 105; 32 Texas, R. 415, with authorities cited.

7. The securities described in said mortgages cover the railroad and franchise of the late Southern Pacific Railroad Company and its property, and now the Texas & Pacific Railway and its property received from the Southern Pacific Railroad Company, with all the property owned at the date of the mortgage, or constructed on the line of the chartered route or acquired since, and are held to secure in all things the faithful payment in future of the coupons and bonds as the same respectively fall due.

8. That all the property and lease of the Vicksburg, Shreveport & Texas Railroad, acquired and owned by the late Southern Pacific Railroad Company, and sold on April 4, 1868, or May 5, 1868, or October 6, 1868, and conveyed to the Texas & Pacific Railway Company on twenty-first day of March, 1872, is covered and held to be liable to the lien by virtue of the aforesaid mortgages.

9. That the liens herein established be foreclosed on all the property described, the railroad, franchise and property of the Texas & Pacific Railway Company, and an order of sale directed

for the benefit of all creditors mentioned in this suit hereafter to come under the decree to be rendered.

We have been unable to discuss or elaborate the many questions raised upon the pleadings and issues in these suits, because it would have made this brief a volume and too cumbersome. It was considered better to merely suggest the main points of evidence and the leading authorities applicable, and leave the Court to draw therefrom the necessary and logical results, believing that the Court could hardly fail to discover that our claims were founded in justice, and were entitled to that equitable relief for which we have prayed.

ROBERTSONS & HERNDON,
Solicitors for Complainant.

SUPPLEMENTAL BRIEF.

THE FOLLOWING IS A SUPPLEMENTAL BRIEF FOR COMPLAINANTS, MADE AFTER READING THE SEVERAL BRIEFS OF THE SOLICITORS FOR THE DEFENDANTS:

It is considered proper to notice some of the points raised and elaborately argued by defendants' solicitors in their printed briefs, not so much because of the logic and force of the reasoning in the presentation of the questions themselves, as to show the fallacies contained in the plausible propositions when applied to the real facts and true theory of this cause.

It is insisted upon in the most persistent manner that complainant have presented pleadings inconsistent with themselves and the merits of the cause. Because he had first declared on the 48 bonds as the owner of them, and after the answer of defendants, amended, by showing that they were really held as collateral to his endorsement for the company of the $30,000 loan. There was no inconsistency here, but following a well established principle in equity that the holder of negotiable securities as collaterals, or under pledge, may sue on them directly, and when collected, must account for balance, after satisfying the debt for which they are pledged. See Story on contracts, vol. 2, sec. 721, 723; Story on Balm, sec. 308; Story on eq. jurisprudence, sec. 1031, 1035; 2 Kent, commentaries, sec. 40, pp. 581-2; 2 Bell, commentaries, sec. 701, 4th ed.; ibid, pp. 20-1-2; Garlick vs. James, 12 Johns, 146; Patchin vs. Pierce, 12 Wood, 61; Hart vs. Teneyck; 2 Johns, ch. R. 62, 513.

The adoption of this plan also necessitated his declaring on the lost notes themselves as a contract directly, in the bill and after the answer, to amend by showing that the three $10,000 notes held a lien on and were secured by the 48 bonds. The reasons and motives assigned in argument by the defense for these changes was that complaint sought to avoid the statute of limitations of two years, plead by defendants. But this was groundless because complainant declared on the paid off notes, or the contract itself, which would not be barred for four years, and the bar was not complete by over eleven months yet to run when the bill was filed. Hence the reasons given were merely plausible but without foundation in law or fact. 19, T., R. Sublett vs. McKinney, 438; 4 Ga., Lumpkin vs. Mills, 344.

Another capital error upon which many authorities were adduced, and which, without a careful analysis, is calculated to mislead the court, was that complainant and others were estopped from demanding payment of defendants for the bonds and interest, and asserting a lien upon the property in possession of defendants on account of *laches*, or equitable estoppel, or, in other words, the demand was *stale*; that the property had changed hands three times, and there had been four sales of it, and thirteen years had elapsed since the inception of these liabilities; that these claimants had stood by and seen the most costly and valuable improvements erected on the property without complaint, until a property of nominal value had been made worth millions of dollars. The doctrine of equitable estoppel is fully recognized, and should, in cases where it can be properly invoked, be applied by courts of chancery. By a careful investigation, however, of the doctrine itself as found in the books, it will readily be seen that it has no application to the case at bar. It does not generally apply where there is a written contract, and by the terms of the contract a term of years are necessary to effect consummation. It never applies to a written obligation not due; as in this case the bonds do not fall due till January 1st, 1883, and hence it can-

not be invoked. It is but rarely applied to a creditor seeking the enforcement of a claim. In the cases where it is usually enforced is where the directors, agents or trustees of corporations exceed their duties by allowing or causing property entrusted to their care sold, publicly or privately, and buying the same, directly or indirectly, for their own use, and the stockholders, who are the *cestue que trust*, and who are cognizant of the facts, and who could have the sale annulled, yet stand by for years and see the trustees and purchasers improve the property by expending large sums of money on it, till it is made valuable, when they awake to a sense of their loss and ask a court of equity to return the property with all the improvements made by the purchasers. In such case a court of equity will not do it. But in some cases will restore the property, or order a sale, and out of the proceeds refund the money expended to the trustee, and the balance pay to the *cestue que trust*. The reason of this is obvious, there *is privity of interest and knowledge* between the trustee or agent and the stockholders or principal, and it was within his power to secure his rights immediately. But no such principle is found as between a creditor or trustees and stockholders of a corporation, or between creditor and principal and agent. The creditor is without privity of interest or knowledge, and the *trustee or cestue que trust* are both held to the strictest accountability for his (the creditor's) protection. How could the holders of these bonds be estopped from collecting an obligation not due, it payable in New York city, and the property and sales in Texas? What opportunity was offered from early in 1861 till 1867, by reason of the war between the States? But complainants show by their evidence that they had no knowledge of refusal to pay till 1872, and fully relied upon their mortgage lien upon the property to secure the ultimate payment. A complete answer, however, to this doctrine is that no title passed by the sale of third September, 1861, and the sale of fifth May, 1868, was prohibited by the constitution of the State, and was void, and would have been void for fraud with-

out this, and no title was passed. So the possessors placed it in the hands of T. A. Scott, February, 1872, and he, with full knowledge of its condition, sold it to the Texas and Pacific Railway Co., of which he was then, and is now, president, and hence took the property under lien with full knowledge of its liability to the bonds, as shown from the books, records and the facts outside of these. So all improvements under such purchase were made subject to these obligations, and not in good faith under the law. On no ground mentioned by the defence can the doctrine be maintained in this case. For authority on this point see the authorities cited by defendant's counsel. The principle is stated with the exceptions in Kerr on frauds, see pp. 300, 304, 305, 309; and Otto, vol. 3, p. 327, Brant vs. Virginia Coal and Iron Co.

There was no fraud or concealment by Stevenson and the other creditors, and there being a mortgage of record and the bonds not due and being written obligations the doctrine of equitable estoppel could have no application. The proposition that no title passed at any one of the several sales of the road, and that the present possessors took with full notice of all incumbrances. See p. 59 of this brief.

Again it is claimed by the defense, with some show of reason, that the account of complainant (see R. pp. 53, 54) is barred by limitation of two years as plead. This question, with authorities, was briefly discussed in first brief, pp. 27-8, but an idditional ground is here asserted, deemed to be sufficient to relieve the account from such a bar. It is distinctly charged in complainant's pleadings that the several sales were tainted with fraud, and that the frauds perpetrated were concealed, which was never known until the same were communicated to complainant by his solicitors, after filing his bill; that the frauds that entered into the several sales were wholly unknown to him, and were not discovered till after the said account would have been barred; that the suit was already instituted when he first ascertained the facts constituting the fraudulent sales. It is a well known principle of law that the

statute does not begin to run till the fraud is discovered, and especially where the facts are concealed, the knowledge of which would enable the owner of a cause of action to protect his interest. Fraud suspends the statute. Such was the case here. This part of complainant's claim is in full force—the statute did not run against it. See 24. T. R., Smith vs. Fly, 345; 18 T. R., Smith vs. Talbot, 774; 8 T. R., McDonald vs. McGuire, 361; 21 Wallace, Bailey vs. Glover, 346, with cases cited in each.

Another position assumed by the defense, and argued with much ability, was that Stevenson could not be a director or president, and therefore make legal his official acts because he did not appear to have been a stockholder from the books. Now this is a fallacy calculated to mislead. For the charter does not require one's name to be on the books to entitle him to vote as a stockholder, and in fact to be so recognized. If he be the owner he is so entitled. And there is a broad distinction between the *owner* and the *apparent* owner whose name appears on the books. The stock may appear in the name of one person on the books for years, while it is legally transferred for value to another, and the vendee during all the time exercising his right of voting and holding office by virtue of such ownership. Now there is not, and cannot be, any doubt that Stevenson did own a large amount of stock, nor can there be any doubt that it was endorsed by him to be placed on the books in his name, nor is there any doubt, after an inspection of the only stock book produced, that no entry of new stock appears therein since 26th May, 1859, which leaves the inference plain that another book was used by the secretary for such entries. Under the state of facts as adduced the entire argument, with the authorities invoked, must yield to the charter, and the cases cited supporting such powers as are plainly conferred by this charter. The charter, sec. 4, reads: "Each share entitles the owner thereof to one vote, by himself or proxy, at all meetings of said company," and shall be transferable by any conveyance in writing, recorded by the treasu-

rer, etc. Again, sec. 5: "No person shall be eligible to the office of director unless an owner or subscriber of at least five shares of the stock of said company." See 37 Maine, Chafing vs. Cummings, 76; 17 N. Eq., Mt. Holly Turnpike Co. vs. Terrell, 117; Gilbert vs. Manchester Iron Manufacturing Co., 11 Wind (N. Y.), 627; 10 Mass., 476; 9 Pick, 204; 11 Pa. st., 120; 20 Cal., 529; 35 Cal., 653; 17 Ill., 84; 4 Duer (N. Y.), 1; 44 N. H., 567; especially see Cole vs. Dyer, 29 Ga., 434; 46 N. Y., 325; 48 N. Y., 585; 3 Daly (N. Y.), 218; 48 Mo., 136; 50 N. H., 571; Ind. 586, note; 40 Cal., 614. These authorities abundantly show that stock may be transferred and pass the title without the transfer being made on the books, and that the owner can enforce his rights against the company. The charter gives the power, however, without the aid of these authorities; they merely illustrate and show that the principle is sound, even if no such power was contained in the charter and by-laws—in fact the charter is so broad as to admit to the directorship either an "*owner or subscriber* of at least five shares of the stock of the company."

Another position assumed is that the lien, by virtue of the mortgage, if it exists at all, is a limited one, and can only extend to the road then built, and the property then owned by the company; that property subsequently acquired, and road afterwards constructed, not being *in esse* at the date of the execution of the mortgage, are not covered by it, and cannot be reached by the holders of these bonds. It is submitted that this is not now an open question in the highest courts of the nation. If the road subsequently constructed is upon the same chartered route, and the property owned was acquired under and by virtue of the same corporate powers and privileges, whether still existing intact as when the mortgage was executed, or merged into another corporation and using a different name, the principle is the same; just as fast as new road is constructed and property acquired, the mortgage covers it and the lien attaches. See 11 Wallace, 459, Galveston Railroad vs. Cowdry; 23 Howard, 117, Pennock vs. Coe; 19 Wallace,

544, Butt vs. Elliott; Central Law Journal, Sep. 22, 1876, p. Barnard, et al, vs. Norwich & Western R. R., et al; ibid, Nov. 17, 1876, p. 735, Everwen, et al, vs. Robb.

Another position assumed by the defendants is, that by the terms of the deeds of trust a lien was not in fact created nor intended to be created upon the franchise and railroad belonging to the Southern Pacific R. R. Co. on the 25th of August, 1860, nor on the 1st day of September, 1860, the date of the issue of the bonds; that if the deeds of trust are otherwise valid, they only held a lien upon the lands then owned or afterwards acquired by the company. This question, if correctly assumed by the defense, would render the mortgage of but little value, and would doubtless have failed in favorably impressing buyers with the value of the security offered. It would seem a useless effort to recite in the bonds themselves that they rested upon the franchise, railroad and chartered rights when, in fact, they only held such lands as might be acquired by the construction of the road. Indeed it would have been a shameless fraud upon the buyer; but the company is bound by the recitals in the bond itself; they have uttered the bond and received value for it; the company is bound by the declarations contained in the bond concerning the security. The company are estopped from denying the truth of such recitals. A careful examination of the mortgages, however, will hardly fail to convince the judicial mind that the grantor intended to and did convey in trust the franchise, all the chartered rights, railroad lands and property belonging then or thereafter to, or to be acquired by, the company. It should be remembered that in examining these mortgages they are taken from a certified copy; the certified copy from the records of Harrison county, Texas; that the Defendants are charged with the possession of the original, hence its non-production is a circumstance against the Company in giving an interpretation of the instrument where so much depends upon inserting or leaving out a single word. On page thirty of the record it will be seen that the directors were clothed with the most ample pow-

er to create a lien on "the franchise, chartered rights and charter, and the real and personal property now owned equitably or legally, or hereafter to be acquired, and all appurtenances and hereditaments thereto belonging, all choses in action, the railroad rolling stock now or hereafter acquired..' Also, on same page. It was resolved by the board of directors "that the President is hereby authorized and empowered to execute at any place in the United States, under the seal of the Company, countersigned by the Secretary, a mortgage or deed of trust for six millions of acres of the land of the Company donated by the State of Texas, and upon the entire line of the railroad of the Company, commencing at the eastern line of the State of Texas, thence extending through the said State to the Rio Grande river, near the town of El Paso. Also, upon the rolling stock, stations, depot grounds and buildings, the franchise and chartered rights of the Company." Here the power is conferred upon the President, and those two resolutions, which were approved by the directors sixth of August, 1860, are made a part and parcel of the mortgages themselves. On page thirty-one of the record, after stating the objects of the mortgages and the issuing of the bonds, the mortgages recite that the security pledged for these bonds shall continue "until the same shall be severally paid and satisfied in the manner and form in said construction bonds and obligations set forth and declared, as by reference thereto will more fully appear." Now, it is obvious that the bonds are referred to, to explain more fully the kind of security mentioned in the mortgages, and they for this purpose become a part of the contract. That is, the bonds issued in pursuance of the resolutions recited and in the terms of the mortgages became a part of the same contract, although actually dated September 1, 1860, and serve to explain any ambiguity that may be found in the mortgages. In the conveying part of the mortgage, p. 32 of record, second line from top, reads: "All and singular the several pieces or parcels of land being the railway station and depots of the railroad of the said parties of the first part from the eastern to the western boundary line of the State of Texas, and all and singular the stations and depot buildings, engine houses and other improvements thereon now made or hereafter to be made."

A careful analysis of this will show that a comma should be put after the word "*railway*" in line three from the top of page thirty-two, and that the entire line of railroad, not its appurtenances, was intended to be conveyed in trust, thus including all the chartered rights. This is apparent from twentieth line from top of page thirty-two, "which is the rate per mile on the estimated length of said road and siding of nine hundred miles *hereby mortgaged.*" The same idea is conveyed on same page at middle and bottom. A fair deduction from this is that the estimated length of the road, nine hundred miles, with all stations, buildings, engine houses and improvements were included. And it would seem that the draftsmen used the word railway with appurtenances as synonomous with charter and chartered rights and franchise. In aid of this view attention is directed to record thirty-three, sixth line from top: "And further provided, that construction bonds shall only be issued in any event upon each completed division of railroad not less than twenty-five miles in length; and further provided, that the money borrowed upon, or materials purchased with, any construction bonds issued upon *any completed divisions of Railroad aforesaid.*" Also, beginning at nineteenth line from top of p. 33: "No such excess of such construction bonds shall issue so that the amounts *encumbered on said Railroad franchises* by virtue of any laws of Texas and of the United States of America, and construction bonds issued by said Company shall not exceed the rate of twenty-six hundred dollars per mile," etc.

It is obvious that the Railroad franchises were encumbered by these mortgages—that they were intended to be covered by them, and that bonds should only be issued as fast as twenty-five miles should be completed; that the lien should extend to the whole line of road and property as fast as it should be acquired. On page thirty-four, ninth line from top, uses these words: "To have and to hold all and singular the *lands and premises* herein granted or intended *so to be.*" Again, at the latter part of first paragraph on page thirty-four of record: "And this identure witnesseth that these presents and the said construction bonds

or obligations are made, executed and delivered upon the *terms, conditions* and *agreements* following, that is to say :

" First, that the actual possession, use, management and control of the said railroad, with all the appurtenances belonging to to it shall be and remain with the parties of the first part so long as the said construction bonds or obligations or the interest due thereon shall remain without default of forfeiture, and said parties of the first part shall perform and keep the *stipulations thereof.*"

Here it becomes evident again that the stipulations contained in the bonds themselves are referred to, and constitute a part of the contract mentioned in the mortgages. And when the bonds are issued upon the terms named, they are declared to contain truthful statements or obligations binding on the Company. The buyer, therefore, need look no further than the charter and mortgages which confer the power to issue the bonds, and to the bonds themselves for the stipulations of the contract, which shall be binding upon both. If there was any room for doubt, however, of the extent of the lien created, it will be removed by examining the record, p. 38, as to the position of the property conveyed in trust in case of default upon the interest or principal. "And this indenture further witnesseth that the said parties of the first part, for themselves and their successors, do covenant and agree to pay unto the holders of the said construction bonds or obligations respectively, the said principal sum of money therein respectively mentioned as above, and as expressed in said bonds or obligations, according to the true intent and meaning thereof, and if default shall be made in the payment of the interest upon the said construction bonds or obligations, so that a sum equal to one year's interest upon the whole amount of the said construction bonds or obligations actually issued and secured by these presents, or if default shall be made in the payment of the principal of said construction bond or obligations, that then and thenceforth it shall and may be lawful for the said parties of the second part to enter into and upon, and take possession of all and singular the said railroad, and all the property included or intended to be included in this mortgage, and also all the engines, tenders, cars, carriages, tools, machinery, and materials in any way belonging or

appertaining to said railroad thus owned by said parties of the first part, in the same manner as if the same had been actually included in and held by this indenture mortgage, and that the said parties of the second part shall and may, by themselves, their officers and agents, take, receive, and collect the income and profits of said railroad, first applying the same to the payment and discharge of all the current expenses of said railroad and its needful repairs, and then to the payment of the interest and principal of said construction bonds or obligations in such manner as they may deem proper.

And further, that the said parties of the second part having entered into full possession of said railroad, and all the equipments thereto belonging, as before provided, may proceed to sell and dispose of the same and all and singular the lands hereinbefore particularly set forth and described remaining unsold at the time of such entry, if any there be." The agreement to pay the bonds is, "as expressed in said bonds or obligations, according to the true intent and meaning thereof," and upon default the entire railroad and property at once goes into the possession of the Trustees of the holders of the bonds, with the right to use and enjoy the same, or to sell the road and property. The use of the word railroad in this connection is more comprehensive than charter, chartered rights or franchise; it actually includes all the charter, chartered rights, franchise and property belonging to the Company then owned or afterwards to be acquired. And the Company loses possession and control of the whole by default, as stipulated. This default occurred many years ago, and stands admitted in the answer of Defendants, hence the lien became absolute from the moment, at least when the default was made at the end of the first year after they (the bonds) were issued, for no interest was ever paid, except upon ten of the bonds to W. H. Smith, on delivery the coupons were cut off by the Company when sold to him in November, 1860. So, if it could be held that under a fair construction of the contract the franchise and charter were not included in the first instance, yet it can hardly be

denied that in case of default that it is and was comprehended a subsisting lien created upon the entire property, charter, chartered rights, railroad and property, and that as fast as the property came into being the lien attached.

It has been shown by repeated references in the mortgages that the bonds themselves constituted part of the contract, and that they explained parts of the same, and that the Company were bound by the stipulations set forth in the bonds. And the references, when we examine the bond itself, are found to be invaluable in determining the true import of the mortgages and the property intended to be made subject to the lien. It is a fortunate circumstance that such reference was made, inasmuch as the Company had the possession of the original mortgage, and has not seen fit to produce it, and the holders of the bonds must resort to secondary evidence to show the contents. The mortgages were signed twenty-fifth August, 1860, and acknowledged for record tenth September, 1860, while the bonds themselves are dated September first, 1860, but are really but the same transactions, and should be construed together as constituting one contract. The resolution passed September first, 1860, printed on the back of each bond, limiting the first issue, tends to show that the contract was not perfected till that day, although the mortgages were signed twenty-fifth August, 1860. Hence the recital on the bonds themselves becomes potent to explain any ambiguity that may exist in the mortgages. The mortgages seem to have the appropriate words to convey the charter, franchise, etc., left out on page thirty-two of the record, where they should be found. If you will insert the words "franchise, charter, chartered rights," in the second line from the top of page thirty-two of the record after the words "all and singular," the whole contract will become consistent with itself and every part thereof. It will also correspond with the recitals in the bonds themselves. Special attention is directed to the bond itself; on the face of the bond it reads: "Construction bond; one thousand dollars; No.—; interest at seven per centum per annum, payable half yearly,

first day of July and first day of January, secured by mortgages of all the chartered rights and railroad of the Company, and by six millions acres of public lands granted by the State of Texas, ten thousand two hundred and forty acres granted for every mile of road completed." Again, in the bond it reads: "The payment of the construction bonds is secured by an indenture of mortgage of the Railroad, and of certain lands and premises therein described, as security for the faithful performance by said Company of their covenants."

The recitations in the bonds refer to the mortgages for explanation just as the mortgages do the bonds, thus making them mutually explain each other and become part of the same contract. If this bond with the recitals were not intended to convey the idea that the "chartered rights and railroad of the Company" were conveyed in trust to secure its faithful payment, then what did it mean? The Company can not be heard to say that it was a fraud and swindle intended to deceive buyers, who by looking upon the bond and mortgages would be led to believe that the security was what it purported to be. To so artfully draw a document that it may be read and seem to offer security or advantages to buyers which, in in fact, it does not, is the rankest of frauds, and can not be set up as a defense by the party using the deception. Courts, however, will look to all the facts, and ascertain, if possible, what was the plain import of the acts of the parties, and force them to abide by them. Is it possible that the Company could, under pretense of creating a lien in its mortgages on certain property, artfully leave out one important word or item in them, but refer for fuller explanation to the bond or obligation, which shows the lien complete, and after selling these bonds for value upon such state of facts be heard to dispute the existence of such lien?

No court of equity will lend itself to such deception. The truth is the fair interpretation of these, evidently, when considered together, is that the franchise, chartered rights, railroad and property were all actually conveyed, and intended to be

conveyed, by virtue of these mortgages as security for the payment of the interest and principal of the construction bonds.

And in the copying of the mortgages on the records, the words franchise and chartered rights, or equivalent words, were negligently left out. Other parts of the mortgages clearly show that these were conveyed, for they are referred to as having been so conveyed. The entire ~~enactments~~ instruments, with the resolutions authorizing them, and every fact connected with their history, show such was the motives and purpose. It would be manifestly unjust to the company, and the men who were engaged in the service of the company at the time when these transactions occurred, to place upon them any other construction. And when the true rules of construction are invoked and rigidly applied it will be difficult to find any other solution. If such was not the intent then the opposite certainly was, that is, the company was deliberately swindling the public in every bond that it issued and sold. We submit that this construction will not be put upon these transactions until the judicial mind fails to find a solution consistent with honorable and fair dealing and with the several parts of the instruments themselves. We feel the utmost confidence in the genuineness of all these transactions, and had the parties all lived who figured in them, there could hardly have existed any grounds for litigation between the holders of these bonds and the present defendants.

In taking leave of the questions involved in this case, which we have but briefly discussed, we have not deemed it to be a part of our duty to reply to the *"thrusts," "stabs"* and *"assaults"* so often repeated in the briefs of counsel against the motives and characters of our clients, and the witnesses called by them to testify. Such is sometimes allowable in *nisi prius* common law courts, before juries, where prejudice is urged to take the place of law and justice, and which we regret to say not unfrequently triumphs in wrong. But we have never known it resorted to with success before upright and enlightened judges who are guided by the principles of reason and a

high sense of justice. If, however, aspersions against the characters of gentlemen who have a national reputation for honest, fair dealing in all the business relations of life, are to be heard on no other evidence than the opinions of counsel we shall regard it as a misfortune to our profession. But whether such charges shall or shall not influence the court in deciding the important questions arising in this case, we must humbly ask for ourselves to be excused from entering such a contest. With our views upon these matters victory in such a contest would be dearly won.

W. S.

[redacted]HERNDON,

Solicitors for Complainant.